(34,002, 34,003)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 693

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, ET AL., PETITIONERS,

vs.

JOHN C. BARCLAY AND WILLOUGHBY COMPANY

No. 694

SHIRLEY P. AUSTIN, PETITIONER,

vs.

JOHN C. BARCLAY AND WILLOUGHBY COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E 43-298

JOHN C. BARCLAY, Plaintiff,

against

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, LAMOTTE T. COHU, GERALD V. HOLLINS, SHIRLEY P. AUSTIN, GEORGE R. LESLIE, AND EARL KRAPP, Defendants

BILL OF COMPLAINT

Plaintiff, John C. Barclay, on his own behalf and on behalf of all holders of the Five Per Cent Profit Sharing Preferred Stock A of defendant Wabash Railway Company, who may hereafter join in the prosecution of this suit, brings this his Bill of Complaint against said Wabash Railway Company, Myron S. Hall, H. W. Cohu, LaMotte T. Cohu, Gerald V. Hollins, Shirley P. Austin, George R. Leslie and Earl Krapp, and alleges:

First. Plaintiff, John C. Barclay, is a citizen and resident of the State of New Jersey, residing at Montclair in said State. Defendant, Wabash Railway Company (hereinafter called the "Railway Company"), is a corporation duly or-
[fol. 2] ganized and existing under the laws of the State of Indiana, and is a citizen and resident of said State and having an office at 120 Broadway, New York City, New York. Defendants, Myron S. Hall, H. W. Cohu and LaMotte T. Cohu are citizens and residents of the City and State of New York. Defendants Gerald V. Hollins and George R. Leslie are citizens and residents of the State of New York, the former residing at East Islip and the latter at Syosset in said State. Defendant, Shirley P. Austin, is a citizen and resident of the Commonwealth of Pennsylvania, residing at Pittsburgh in said Commonwealth. Defendant, Earl Krapp, is a citizen and resident of the State

of New York, residing in New York City in said State. Defendants, Myron S. Hall, H. W. Cohu and LaMotte T. Cohu, are co-partners doing business under the firm name and style of Myron S. Hall & Co., having their principal office at 100 Broadway, New York City, New York. Defendants, Gerald V. Hollins, Shirley P. Austin and George R. Leslie, are co-partners doing business under the firm name and style of C. D. Halsey and Co., having their principal office at 27 William Street, New York City, New York.

Second This is a suit of a civil nature in equity and the matter in controversy herein exceeds, exclusive of interest and costs, the sum of value of $5,000.

Third. The Railway Company owns, possesses, controls and operates a railway system lying within the States of Ohio, Illinois, Indiana, Iowa and Missouri. It was duly organized under the laws of Indiana on or about October 22, 1915. A copy of its Certificate of Incorporation is [fol. 3] hereto annexed, marked Exhibit A, and made a part hereof.

Fourth. As appears by Article "Third" of said Certificate of Incorporation, the original capital stock of the Railway Company consisted of 1,434,600 shares, each of the par value of $100, classified as follows:

462,000 shares, each of the par value of $100, of Five Per Cent Profit Sharing Preferred Stock A.

499,700 shares, each of the par value of $100, of Five Per Cent Convertible Preferred Stock B.

472,900 shares, each of the par value of $100, of Common Stock.

Said Five Per Cent Convertible Preferred Stock B (hereinafter called "Preferred Stock B") was by its terms convertible into said Five Per Cent Profit Sharing Preferred A (hereinafter called "Preferred Stock A") and said Common Stock of the Railway Company at the rate of one-half share of said Preferred Stock A and one-half share of said Common Stock for each share of Preferred Stock B of the Railway Company. By reason of conversion of Preferred Stock B pursuant to the conversion privilege inhering therein as aforesaid and for other reasons unknown

to plaintiff the number of shares of the several classes of stock of the Railway Company outstanding on May 1, 1927, and now outstanding was as follows:

693,330.50 shares, each of the par value of $100, of said Preferred Stock A.

24,211.42 shares, each of the par value of $100, of said Preferred Stock B.

[fol. 4] 666,977.75 shares, each of the par value of $100, of said Common Stock.

Fifth. Plaintiff is and for several years last past has been the owner and holder of 100 shares, each of the par value of $100, of said Preferred Stock A of the Railway Company. Defendants, Myron S. Hall, H. W. Cohu and LaMotte T. Cohu, as such copartners, are the owners and holders of 2,197 shares, each of the par value of $100, of said Preferred Stock B of the Railway Company. Defendants, Gerald V. Hollins, Shirley P. Austin and George R. Leslie, as such co-partners, are the owners and holders of 15,505 shares, each of the par value of $100, of said Common Stock of the Railway Company, and defendant, Earl Krapp, is the holder and owner of 2,500 shares of such Common Stock.

Sixth. The owners and holders of said Preferred Stock B and of the said Common Stock of the Railway Company are numerous and widely scattered, and many of them are unknown to plaintiff. Said Myron S. Hall, H. W. Cohu and LaMotte T. Cohu have been made parties defendant hereto as representatives of the holders of the Preferred Stock B and said Gerald V. Hollins, Shirley P. Austin, George R. Leslie and Earl Krapp have been made parties defendant hereto as representatives of the holders of the Common Stock of the Railway Company.

Seventh. The respective rights of the three classes of stock of the Railway Company to dividends are set forth in Article Fourth of the Certificate of Incorporation, hereto annexed as Exhibit A, and also in the certificates issued by the Railway Company for said several classes of its stock. A copy of the certificate issued by the Railway Company [fol. 5] for said Preferred Stock A is hereto annexed, marked Exhibit B, and made a part hereof. The right of

said Preferred Stock A to dividends is set forth in the Certificate of Incorporation in the following language:

"The Five Per Cent. Profit Sharing Preferred Stock A shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of this corporation, but such dividends on the Five Per Cent. Profit Sharing Preferred A Stock shall be non-cumulative."

The right of the Preferred A Stock to dividends is set forth in the certificates representing such stock in the following language:

"The holders of the Five Per Cent. Profit Sharing Preferred Stock A of the Company shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of the Company, but such preferential dividends shall be non-cumulative."

Eighth. In every fiscal year since the organization of the Railway Company in October, 1915, down to and including 1926, the Railway Company has had large net earnings available for dividends on its said Preferred Stock A. No dividends were declared or paid by the Railway Company upon its said Preferred Stock A during the period from the organization of the Railway Company until January 29, 1917, although during said period the Railway Company had net earnings in large amounts available for dividends on such stock. On January 29, 1917, the Railway Company paid a dividend of 1% upon its said Pre- [fol. 6] ferred Stock A, and paid a like dividend of 1% thereon quarterly thereafter, up to and including April 30, 1918. During said period from January 29, 1917, up to and including April 30, 1918, the Railway Company had net earnings in each fiscal year available for dividends on its said Preferred Stock A more than sufficient to pay the full preferential dividend of 5% in each fiscal year on said Preferred Stock A. During the period from and after April 30, 1918, to May 25, 1925, no dividends were paid upon said Preferred Stock A, although during said period the Railway Company in each fiscal year had net earnings available

for dividends on said Preferred Stock A sufficient to pay dividends in large amounts in each fiscal year upon such stock. On May 25, 1925 the Railway Company paid a quarterly dividend of 1¼% upon its said Preferred Stock A and has thereafter paid a quarterly dividend of like amount down to the date hereof, such amount representing dividends of 5% in each fiscal year since May 25, 1925, upon said Preferred Stock A.

Ninth. The earnings of each fiscal year available for dividends on said Preferred Stock A of the Railway Company in each year in which the Company declared no dividends or declared dividends of less than 5% on said Preferred Stock A, were retained by the Railway Company and carried to its surplus account and used for additional working capital and for other purposes.

Tenth. During the period from the organization of the Railway Company to May 25, 1925, the aggregate of the preferential dividends of 5% in each fiscal year upon said Preferred Stock A of the Railway Company, to the extent that the Railway Company had in each fiscal year during [fol. 7] said period net earnings available for the payment of such dividends, amounted to more than $16,000,000 in excess of the dividends declared and paid by the Railway Company upon said Preferred Stock A during said period and all of said sum of $16,000,000 available for such dividends, but unpaid therefor, was carried to the surplus of the Railway Company and used for additional working capital and for other proper corporate purposes.

Eleventh. The Railway Company paid no dividends upon its said Preferred Stock B from the organization of the Railway Company until April 1, 1927. On April 1, 1927, the Railway Company paid a dividend of 5% upon its said Preferred Stock B, but has paid no dividends thereon since April 1, 1927. The Railway Company has heretofore paid no dividends on its said Common Stock.

Twelfth. The Railway Company since May 1, 1925, has in each fiscal year had net earnings available for dividends on its capital stock in amounts more than sufficient to pay in full the preferential 5% dividend on its said Preferred Stock A. The Railway Company is now in such financial

condition that it no longer needs to retain as surplus, its net earnings in prior fiscal years which were available for preferential dividends on its said Preferred Stock A unpaid in such prior fiscal years. Plaintiff is informed and believes that the Railway Company threatens to and will, unless restrained by this Honorable Court, at once inaugurate the payment of regular dividends upon its said Preferred Stock B and upon its Common Stock, and threatens to and will pay such dividends out of its earnings or surplus, without [fol. 8] first having made good and paid out of such surplus full preferential dividends of 5% in each fiscal year upon its Preferred Stock A from the time of the organization of the Company down to the date hereof, to the extent that such preferential dividends were earned in each fiscal year but were not paid in full, thereby depriving the holders of its said Preferred Stock A of the dividend rights inhering in said Preferred Stock A and diverting from said Preferred Stock A net earnings available for said preferential dividends thereon which were not paid.

Thirteenth. The Railway Company claimed the right to pay the dividends above mentioned on its said Preferred Stock B and claims the right and threatens to pay future dividends thereon and to pay dividends on its said Common Stock in each fiscal year out of its net earnings in such fiscal year, remaining after the payment in such fiscal year of the preferential dividends on its said Preferred Stock A, without having first declared and paid on its said Preferred Stock A the unpaid preferential dividends on such Preferred Stock A for prior fiscal year in which the Railway Company had net earnings available for the payment of such unpaid preferential dividends.

Fourteenth. Under the contract between the Railway Company, the holders of said Preferred Stock A and the holders of the other classes of stock of the Railway Company, the holders of said Preferred Stock A are entitled to receive preferential dividends in each fiscal year up to the amount of 5% to the extent that the Railway Company has earnings in such fiscal year available for such dividends, before any dividends may be paid upon any other stock of [fol. 9] the Company and are entitled to receive such preferential dividends in full in each fiscal year to the extent

that the Railway Company has net earnings in such year available for the payment of such dividends, before any dividends may be paid on any other class of stock of the Railway Company, and, to the extent that such preferential dividends have been earned but not paid by the Railway Company, the holders of said Preferred Stock A are entitled to receive such earned but unpaid preferential dividends, before any dividends may be declared or paid by the defendant Railway Company to the holders of stock of any other class.

Fifteenth. The Railway Company is without legal right under its Certificate of Incorporation to declare or pay any dividends upon any class of its stock other than its said Preferred Stock A until after all the earned but unpaid preferential dividends for each fiscal year up to the full amount of 5% upon such Preferred Stock A shall have been paid to the holders of such stock. The Railway Company had and has no legal right to declare or pay said dividends above mentioned or any dividends upon its said Preferred Stock B or to declare or pay any dividends upon its said Common Stock, and said payments were and will be in violation of plaintiff's contract with the Railway Company and the holders of its stock of other classes.

Sixteenth. Plaintiff has no adequate remedy at law and can have relief only in court equity. Plaintiff therefore files this his Bill of Complaint and prays for relief as follows:

1. That the rights of plaintiff and of all other holders of [fol. 10] the Preferred Stock A of the Railway Company and of the holders of the Preferred Stock B of the Railway Company and of the Common Stock of the Railway Company in and to dividends from the net earnings of the Railway Company available for dividends upon its capital stock be determined.

2. That this Honorable Court decree that the holders of said Preferred Stock A of the Railway Company are entitled to receive preferential dividends up to the amount of 5% for each fiscal year from 1915 to 1926 inclusive to the extent that such dividends were earned in such fiscal years but were unpaid, but not in excess of 5% for any fiscal year, before any dividends be paid by the Railway Company upon any other class of its stock.

3. That the Railway Company be enjoined and restrained from declaring or paying any further dividends upon its said Preferred Stock B or any dividends upon its Common Stock, until after all the preferential dividends at the rate of 5% in each fiscal year upon its said Preferred Stock A from the date of the organization of said Company down to and including the fiscal year 1926, to the extent that the Railway Company has had net earnings available for the payment of such dividends and to the extent that such dividends remain unpaid, shall have been paid to the holders of said Preferred Stock A.

4. That an interlocutory injunction issue out of and under the seal of the Court, enjoining and restraining the Railway Company temporarily and pending the determination of this suit from declaring or paying any dividends upon its said Preferred Stock B or any dividends upon its Common Stock, unless it shall first have paid all the preferential [fol. 11] dividends at the rate of 5% in each fiscal year from the date of the organization of the Railway Company down to and including the fiscal year 1926, to the extent that the Railway Company has had net earnings available for the payment of such dividends and to the extent that such dividends remain unpaid.

5. That plaintiff have such other and further relief as may be meet and just in the premises.

Wm. R. Begg, Solicitor for Plaintiff. Office & P. O. Address: 24 Broad Street, Borough of Manhattan, New York City. Hornblower, Miller & Garrison, of Counsel.

Duly sworn to by John C. Barclay. Jurat omitted in printing.

[fol. 12] EXHIBIT A TO BILL OF COMPLAINT

Know all men by these presents that we, the undersigned, whose names are hereunto subscribed, being the purchasers at the sale hereinaftr mentioned and the associates of such purchasers, do hereby certify that, under and in pursuance of an Act of the General Assembly of the State of Indiana

approved March 3, 1865, entitled "An Act to authorize, regulate and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same," and any and all supplements thereof and amendments thereto, we have formed a corporation for the purpose of acquiring, owning, maintaining and operating the railroad, property and franchises sold at said sale and hereinafter described; and we do further specify and certify as follows:

First. The name and style of this corporation shall be Wabash Railway Company.

Second. The number of directors of this corporation shall be fifteen, and the names of the first directors are as follows: Samuel Armstrong, H. Brua Campbell, Robert Goelet, Lawrence Greer, Edward F. Kearney, William C. Maxwell, George Welwood Murray, Robert H. Neilson, John [fol. 13] C. Otteson, Winslow S. Pierce, Lyman Rhoades, Allison E. Stuart, William V. Stuart, James E. Taussig, and Henry Rogers Winthrop. The period of the service of the first directors shall be from the filing of this certificate in the office of the Secretary of State of the State of Indiana until the second Tuesday in October, 1916. Vacancies occurring in the first board of directors, or any subsequent board, through death, resignation or otherwise, may be filled, until the next annual election of directors by the stockholders, by the vote of a majority of the whole board of directors.

Third. The amount of the original capital of this corporation is One Hundred and Forty-three Million, Four Hundred and Sixty Thousand Dollars ($143,460,000), and the number of shares into which said capital is to be divided is one million, four hundred and thirty-four thousand, six hundred (1,434,600) shares of the par value of One Hundred Dollars ($100) each. Of such capital stock four hundred and sixty-two thousand (462,000) shares shall be issued as Five Per Cent. Profit Sharing Preferred Stock A, four hundred and ninety-nine thousand, seven hundred (499,700) shares shall be issued as Five Per Cent. Con-

vertible Preferred Stock B, and four hundred and seventy-two thousand, nine hundred (472,900) shares shall be issued as Common Stock.

Fourth. The Five Per Cent. Profit Sharing Preferred [fol. 14] Stock A shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of this corporation, but such dividends on the Five Per Cent. Profit Sharing Preferred Stock A shall be noncumulative. After the payment or the setting apart in any one fiscal year of five per cent. dividends upon the Five Per Cent. Convertible Preferred Stock B and upon the Common Stock of this corporation, the Five Per Cent. Profit Sharing Preferred Stock A shall be entitled to receive additional dividends at the same rate per cent. as any further or additional dividends which may be declared in that year upon such Common Stock. The Five Per Cent. Profit Sharing Preferred Stock A shall, at the option of this corporation, be redeemable as an entirety at any time after December 1, 1920, upon twelve weeks' notice, at the price of one hundred and ten per cent. (110%) of its par value. In the event of any liquidation, dissolution or winding up (whether voluntary or involuntary) of this corporation, the holders of the Five Per Cent. Profit Sharing Preferred Stock A shall be entitled to be paid in full, out of the assets of this corporation, the par amount of their stock and all dividends thereon declared and unpaid, before any amount shall be paid out of said assets to the holders of any other stock of this corporation; but after payment in full to the holders of the Five Per Cent. Convertible Preferred Stock B and Common Stock of this corporation of the par amount of their stock and all dividends thereon declared and unpaid, holders of all classes of stock of this corporation, without priority or distinction as between the different classes thereof, shall be entitled to participate pro rata in the remaining assets of this corporation.

[fol. 15] The Five Per Cent. Convertible Preferred Stock B shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. after payment of the full five per cent. dividends on the Five Per Cent. Profit Sharing Preferred Stock A, but before any divi-

dend shall be paid upon the Common Stock of this corporation. Said dividends shall be non-cumulative, and the Five Per Cent. Convertible Preferred Stock B shall not be entitled to any other or further dividends in any fiscal year. The holders of the Five Per Cent. Convertible Preferred Stock B may, at any time after August 1, 1918, and up to thirty days prior to any date fixed for the redemption of the entire issue of Five Per Cent. Profit Sharing Preferred Stock A, convert the same into, and exchange the same for, Five Per Cent. Profit Sharing Preferred Stock A and Common Stock of this corporation. For the purpose of such conversion this corporation shall have power, from time to time, to issue such amounts of its Five Per Cent. Profit Sharing Preferred Stock A and Common Stock in addition to the amounts hereby specifically authorized as may be necessary. Such conversion shall be at the rate of Fifty Dollars ($50) par value of Five Per Cent. Profit Sharing Preferred Stock A and Fifty Dollars ($50) par value of Common Stock for each One Hundred Dollars ($100) par value of Five Per Cent. Convertible Preferred Stock B, with a proper adjustment of declared and unpaid dividends. The Five Per Cent. Convertible Preferred Stock B shall, at the option of this corporation, be redeemable at an entirety at any time after December 1, 1920, upon twelve weeks' notice, at the price of one hundred and ten (110%) [fol. 16] per cent. of its par value. In the event of any liquidation, dissolution or winding up (whether voluntary or involuntary) of this corporation, the holders of the Five Per Cent. Convertible Preferred Stock B, shall be entitled to be paid in full, out of the assets of this corporation, the par amount of their stock and all dividends thereon declared and unpaid, before any amount shall be paid out of said assets to the holders of the Common Stock; but after payment in full to the holders of the Common Stock of the par amount of their Common Stock and all dividends thereon declared and unpaid, holders of all classes of stock of this corporation, without priority or distinction as between the different classes thereof shall be entitled to participate pro rata in the remaining assets of this corporation.

Fifth. This corporation is organized for the purpose of acquiring, owning, maintaining and operating the railroads,

property and franchises heretofore owned by The Wabash Railroad Company, which said railroad and property is situated partly within the State of Indiana and was purchased by Henry Rogers Winthrop and Robert Goelet, two of the undersigned, as a purchasing committee, at a sale thereof at one time and place, as an entirety, held on July 21, 1915, pursuant to a decree of foreclosure and sale entered on or about January 30, 1914, in certain judicial proceedings brought for the foreclosure of a mortgage of The Wabash Railroad Company, dated July 1, 1906, and known as its First Refunding and Extensions Mortgage, said decree of foreclosure and sale having been made and entered by the District Court of the United States for the Eastern [fol. 17] Division of the Eastern District of Missouri in a certain cause therein pending, wherein The Equitable Trust Company of New York, Trustee, was complainant and said The Wabash Railroad Company and another were defendants, which said decree was subsequently adopted and entered in certain ancillary causes between the same parties by the District Courts of the United States for the Western Division of the Western District of Missouri, Central Division of the Southern District of Iowa, District of Nebraska, District of Indiana, Eastern District of Illinois, Northern District of Illinois, Eastern Division, Southern District of Illinois, Southern Division, Southern District of New York, Eastern District of Michigan, Southern Division, Northern District of Ohio, Western Division, and which said sale was subsequently confirmed and made absolute by orders entered in all of said Courts.

Said railroads are described as follows: All and singular the lines of railroad formerly belonging to The Wabash Railroad Company and extending:

(1) From the City of Toledo, in a westerly direction into or through the Counties of Lucas, Fulton, Henry, Defiance and Paulding, in the State of Ohio, and the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, [fol. 18] and the Counties of Vermilion, Champaign, Piatt, Macon, Sangamon, Morgan and Scott, in the State of Illinois, to Bluffs, in said State, and from Bluffs through Naples, in said County of Scott, to East Hannibal on the east bank of the Mississippi River in the County of Pike,

State of Illinois, including all property of the Railroad Company situate in the City of Hannibal, County of Marion and State of Missouri; from Bluffs into or through the Counties of Scott, Morgan, Pike, Brown and Adams in the State of Illinois, to Camp Point in said County of Adams; from Clayton into or through the Counties of Adams and Hancock, in the State of Illinois, to Elvaston, and from Hamilton, to a point on the east bank of the Mississippi River opposite Keokuk, Iowa, also a right-of-way between Elvaston and Hamilton; from Decatur into or through the Counties of Macon, Christian, Montgomery, Macoupin, Madison and St. Clair, in the State of Illinois, to East St. Louis in said State; from Effingham into or through the Counties of Effingham, Shelby, Moultrie, Piatt, McLean, Champaign and Ford, to Forrest in Livingston County, in the State of Illinois, and through the Counties of Livingston and LaSalle from Fairbury to Streator in said State; from Altamont, in the County of Effingham, State of Illinois, to Shumway in said County; from Forrest through the Counties of Livingston, Kankakee, Will and Cook, in the State of Illinois, to or near the City of Chicago, in said State; from Edwardsville, Madison County, Illinois, to Edwardsville Crossing in said County; from Detroit, in the State of Michigan, in a westerly direction, into or through the Counties of Wayne, Washtenaw, Monroe and Lenawee, in the State of Michigan, and from thence into or through [fol. 19] the Counties of Fulton and Williams, in the State of Ohio, and into or through the County of Dekalb to Butler, in the State of Indiana; from the City of St. Louis, State of Missouri, by the way of North Market Street and Bellefontaine to Ferguson in the County of St. Louis; from the Union Depot in the said City of St. Louis by the way of Forest Park to Ferguson and from thence in a northwesterly direction into and through the Counties of St. Louis, St. Charles, Warren, Montgomery, Audrain, Boone and Randolph, in the State of Missouri, to Moberly, in said State (including the bridge over the Missouri River at St. Charles), and from thence in a westerly direction into or through the Counties of Randolph, Chariton, Carroll, Ray, Clay and Jackson, in the State of Missouri, to Kansas City, in said State; from Salisbury in the County of Chariton, State of Missouri, to Glasgow in Howard County; from Mo-

berly in a northerly direction through the Counties of Randolph, Macon, Adair and Schuyler, in the State of Missouri, and from thence into or through the Counties of Appanoose, Davis and Wapello in the State of Iowa, to Ottumwa, in said State, and from Centralia, in the County of Boone, State of Missouri, to Columbia in said County and State.

(2) From Montpelier in the County of Williams, State of Ohio, in a southeasterly direction, into or through the Counties of Williams, Fulton and Lucas, in said State of Ohio, to a point of connection with the railroad of the Railroad Company at or near Maumee in said County of Lucas; from New Haven in the County of Allen, State of Indiana, into or through said County and the County of Dekalb, in said State, to a point of connection with the [fol. 20] railroad of the Railroad Company at or near Butler in the said County of Dekalb; from a point of connection with the railroad of the Railroad Company in the town of Montpelier in the County of Williams, State of Ohio, and extending in a westerly direction through said County and into or through the Counties of Steuben, La Grange, Noble, Elkhart, St. Joseph, Laporte, Porter and Lake, in the State of Indiana, to a point of connection with the tracks of the Baltimore and Ohio Chicago Terminal Railroad Company at or near Clarke Junction, in the State of Indiana.

(3) From the grounds of the Union Pacific Transfer in the City of Council Bluffs, Iowa, and from the freight depot of the Railroad Company, in the City of Council Bluffs, to a connection with the line from the Union Pacific Transfer, through the Counties of Pottawattamie, Mills, Fremont and Page, in said State of Iowa, and the Counties of Atchison, Nodaway, Gentry and Daviess, in the State of Missouri, to or near Pattonsburg, in said County of Daviess and State of Missouri.

(4) From a point of connection in or near the City of Des Moines with the tracks of the Des Moines Union Railway Company and extending from thence in a southeasterly direction through the Counties of Polk, Marion and Monroe to the town of Albia in said County of Monroe, from Albia in said County of Monroe, thence in a southerly direction

through the Counties of Monroe and Appanoose to a point in or near the town of Moulton in said County of Appanoose.

Also the right, title and interest formerly belonging to The Wabash Railroad Company in and to all or any of the [fol. 21] railroads, property, franchises, rolling stock, equipment and appurtenances of the following named companies, all of whose railroads, property and equipment was leased to The Wabash Railroad Company, namely:

The Brunswick and Chillicothe Railroad Company, a corporation organized under the laws of Missouri, owning a line of railroad extending from a point on the line of railroad of The Wabash Railroad Company at Brunswick, in the State of Missouri, in said State, to Chillicothe.

The St. Louis, Council Bluffs and Omaha Railway Company, a corporation organized under the laws of Missouri, owning a line of railroad extending from the City of Chillicothe, County of Livingston, State of Missouri, to a point at or near the town of Pattonsburg, in the County of Daviess, State of Missouri.

Also all the right, title and interest formerly belonging to The Wabash Railroad Company and to a line of railroad formerly belonging to the Champaign and Southeastern Railroad Company, extending from Champaign to Sidney in the County of Champaign, State of Illinois, and a line of railroad formerly belonging to the Attica, Covington and Southern Railway Company, extending from Attica to Covington in the County of Fountain, State of Indiana.

Sixth. This corporation shall have the power to sue and be sued, contract and be contracted with, and maintain and [fol. 22] operate the railroad in this certificate named, and to transact all business connected with the same, and shall also possess all the powers, rights, privileges, immunities and franchises in respect to said railroad purchased as aforesaid, and of all the real and personal property appertaining to the same, which were possessed or enjoyed by said The Wabash Railroad Company previous to said sale by virtue of its charter and amendments thereof and of the laws of the State of Indiana, or of any State in which any part of said railroad is situated and not inconsistent with the laws of the State of Indiana.

Seventh. This corporation shall have the power to assume any debts and liabilities of said The Wabash Railroad

Company and to make such adjustment and settlement with any stockholder or stockholders, or creditor or creditors, of said company as may be deemed expedient, and, for such purpose to use such portions of the bonds and stock of this corporation as may be deemed advisable, and in such manner as this corporation may deem proper.

This corporation shall have capacity to hold, enjoy and exercise within other States the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of the State of Indiana or of any other State in which any portion of its railroad may be situated or in which it may transact any part of its business, and may hold meetings of its stockholders and of its board of directors and do all corporate acts and things without the State of Indiana as validly, and to the same extent, as it may do the same within said State, on the line of its road and may make by-laws, rules and regulations in relation to its business and the number of its directors and the times and places of holding meetings of [fol. 23] stockholders and directors, and may alter and change the same as may be deemed expedient.

This corporation shall also have, exercise and enjoy all and singular the other powers, privileges, franchises and immunities granted and allowed by the above-mentioned act of March 3, 1865, of the General Assembly of the State of Indiana, and of all acts supplemental thereof and amendatory thereto.

Witness our hands at the City of Indianapolis in the State of Indiana this 22nd day of October, A. D. 1915.

H. Brua Campbell, Robert Goelet, Lyman Rhoades, William Stuart, Henry Rogers Winthrop.

STATE OF INDIANA,
County of Maron, ss:

Before me, the undersigned, a notary public in and for the aforesaid state and county, duly qualified, personally came H. Brua Campbell, Robert Goelet, Lyman Rhoades, William V. Stuart and Henry Rogers Winthrop, known to me to be all of the persons described in and whose names are subscribed to the foregoing instrument, and duly and severally acknowledged the execution of the same this 22nd day of October, A. D. 1915.

Given under my hand and seal of office this 22nd day of October, A. D. 1915.

My commission expires October 29, 1918.

Theodore L. Locke, Notary Public. (Notarial Seal.)

[fol. 24] UNITED STATES OF AMERICA,
State of Indiana:

Office of the Secretary of State

I, Homer L. Cook, Secretary of State of the State of Indiana, hereby certify that the annexed pages contain a full, true and complete copy of the articles of association, or agreement in writing, of Wabash Railway Company with the several certificates thereon, filed October 22nd, 1915, as the same appears on file, as the law directs, in this office.

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Indiana. Done at my office in the City of Indianapolis, this 22nd day of October, A. D. 1915.

Homer L. Cook, Secretary of State. (Seal of the State of Indiana.)

[fol. 25] EXHIBIT B TO BILL OF COMPLAINT

No. —. Shares $100 Each. Shares —

Incorporated Under the Laws of the State of Indiana

Wabash Railway Company

Five per Cent. Profit-sharing Preferred Stock A

This certifies that —— —— is the owner of — fully paid and non-assessable shares of the Five Per Cent. Profit Sharing Preferred Stock A of Wabash Railway Company of the par value of One Hundred Dollars ($100) each, transferable in person or by attorney on surrender of this certificate duly endorsed. The holders of the Five Per Cent. Profit Sharing Preferred Stock A of the Company shall be entitled to receive preferential dividends in each

fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of the Company, but such preferential dividends shall be non-cumulative. The holders of the Five Per Cent. Convertible Preferred Stock B of the Company shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. after payment of the full five per cent. dividend on the Five Per Cent. Profit Sharing Preferred Stock A, but before any dividends shall be paid upon the Common Stock, but such preferential dividends shall be non-cumulative, and the holders of the Five Per Cent. Convertible Preferred Stock B shall not be entitled to any [fol. 26] other or further dividends in any fiscal year. After the payment or the setting apart in any one fiscal year of five per cent. dividends upon the Five Per Cent. Convertible Preferred Stock B, and upon the Common Stock, the holders of the Five Per Cent. Profit Sharing Preferred Stock A shall be entitled to receive additional dividends at the same rate per cent. as any further or additional dividends which may be declared in that year upon the Common Stock. The Five Per Cent. Profit Sharing Preferred Stock A shall, at the option of the Company, be redeemable as an entirety at any time after December 1, 1920, upon twelve weeks' notice at the price of One Hundred and Ten per cent. of its par value, and the Five Per Cent Convertible Preferred Stock B, at the option of the Company, shall be redeemable as an entirety at any time after December 1, 1920, upon like notice and at the same price. The holders of the Five Per Cent Convertible Preferred Stock B may at any time after August 1, 1918, and up to thirty days prior to any date fixed for the redemption of the entire issue of Five Per Cent Profit Sharing Preferred Stock A, convert the same into and exchange the same for Five Per Cent Profit Sharing Preferred Stock A and Common Stock at the rate of Fifty Dollars ($50) par value of Five Per Cent Profit Sharing Preferred Stock A, and Fifty Dollars ($50) par value of Common Stock for each One Hundred Dollars ($100) par value of Five Per Cent Convertible Preferred Stock B, with a proper adjustment of declared and unpaid dividends. In the event of any liquidation, dissolution or winding up (whether vol-

untary or involuntary) of the Company, (1) the holders of the Five Per Cent Profit Sharing Preferred Stock A [fol. 27] shall be entitled to be paid in full out of the assets of the Company the par amount of their stock and all dividends thereon declared and unpaid before any amount shall be paid out of said assets to the holders of any other stock of the Company, (2) the holders of the Five Per Cent Convertible Preferred Stock B shall then be entitled to be paid in full out of the assets of the Company the par amount of their stock and all dividends thereon declared and unpaid before any amount shall be paid out of said assets to the holders of the Common Stock, (3) the holders of the Common Stock shall then be entitled to be paid in full out of the assets of the Company the par amount of their stock and all dividends thereon declared and unpaid, and (4) thereafter the holders of all classes of stock of the Company, without priority or distinction as between the different classes thereof, shall be entitled to participate pro rata in the remaining assets of the Company. Holders of all shares of stock of the Company have equal voting rights share for share alike. Reference is hereby made to the Certificate of Incorporation of the Company, to all the provisions of which this certificate and the rights of the holder of stock represented hereby are subject, for a statement of the rights and privileges of and the limitations upon the various classes of the Company's stock and of the obligations of the Company with respect thereto and for its provisions generally as if herein set forth in full. The holder hereof by the acceptance of this certificate assents to all of the provisions of said Certificate of Incorporation and consents to and authorizes such action as may be necessary to carry the same into effect.

[fol. 28] In witness whereof the Company has caused this certificate to be signed by its proper officers and its corporate seal to be hereto affixed ——— —, ———.

——— ———, Vice-President. ——— ———, Secretary.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF WABASH RAILWAY COMPANY

Wabash Railway Company, defendant herein (hereinafter called the Railway Company), for its answer to the Bill of Complaint of the plaintiff above named, respectfully shows and alleges as follows:

First. The Railway Company admits that it is a corporation duly organized and existing under the laws of the State of Indiana and is a citizen and resident of that State, and upon information and belief it admits the citizenship of the plaintiff John C. Barclay and of the individual defendants and admits that Myron S. Hall & Company and C. D. Halsey & Company have offices in the City of New York, as alleged in paragraph First of the Bill of Complaint.

[fol. 30] Second. The Railway Company admits the allegations contained in paragraph Second of the Bill of Complaint.

Third. The Railway Company admits the allegations contained in paragraph Third of the Bill of Complaint.

Fourth. The Railway Company admits the allegations contained in paragraph Fourth of the Complaint, but for greater certainty begs leave to refer to the Certificate of Incorporation, a true copy of which is annexed to the Bill of Complaint as "Exhibit A" thereto.

Fifth. The Railway Company admits that the plaintiff is and for several years last past has been the owner and holder of 100 shares of the par value of $100 each of the Five Per Cent Profit Sharing Preferred Stock A of the Railway Company (herein and in the Bill of Complaint sometimes referred to as Preferred Stock "A") and admits that Myron S. Hall & Company, C. D. Halsey & Company and Earl Krapp are respectively the registered owners or holders of the amounts of stock mentioned in paragraph Fifth of the Bill of Complaint.

Sixth. The Railway Company admits that the owners and holders of the Five Per Cent Convertible Preferred

Stock B (herein and in the Bill of Complaint sometimes referred to as Preferred Stock "B") and Common Stock of the Railway Company are numerous and widely scattered, but denies that many of them are unknown to the plaintiff and avers that the plaintiff, through his attorneys, [fol. 31] has been given access to and is familiar with the stock books of the Railway Company. The Railway Company admits that defendants other than the Railway Company have been made parties as representatives of the holders of Preferred Stock "B" and Common Stock of the Railway Company.

Seventh. The Railway Company admits the allegations contained in paragraph Seventh of the Bill of Complaint, but for greater certainty begs leave to refer to its Certificate of Incorporation and the Certificate for its Preferred Stock "A," true copies of which are annexed to the Bill of Complaint, marked respectively "Exhibit A" and "Exhibit B."

Eighth. The Railway Company admits the allegations contained in paragraph Eighth of the Complaint respecting the payment and non-payment of dividends between the years 1915 and 1926, but it denies that there were large net earnings available for dividends on its Preferred Stock "A" in the period mentioned in said paragraph and denies that its earnings in any part or parts of said period justified the payment of any dividends which were not actually paid, and, although admitting balances of net earnings in certain non-dividend periods over expenses and prior charges, the Railway Company denies that any part of such balances could, consistently with its lawful obligations to its stockholders, or with its duties to the public in safe and efficient maintenance of property and service, or with sound discretion and the duty of its directors, have been distributed to stockholders, and avers that its entire surplus earnings of all periods since the incorpora- [fol. 32] tion of the Railway Company not actually distributed to stockholders and not reserved for working capital or necessary corporate requirements has been actually appropriated to and is now represented by fixed and permanent improvements and additions to the property and equipment of the Railway Company to enable it adequately

to discharge its public duties and protect its property, and that no part of such alleged surplus is represented by any cash or liquid fund or by any accumulation of cash assets available for dividends.

Ninth. The Railway Company admits the allegations contained in paragraph Ninth of the Bill of Complaint, except that while admitting that balances of net earnings over expenses and prior charges in the period referred to in said paragraph were carried to its surplus account and used for additional working capital and other purposes, it denies the availability of such surplus for dividends on the Preferred Stock "A."

Tenth. Answering paragraph Tenth of the Complaint, the Railway Company while admitting balances of net earnings over expenses and prior charges in substantial amounts during the period from its organization to May 25, 1918, it denies the availability of net earnings for dividends upon the Preferred Stock "A" beyond the amounts actually distributed by the Railway Company, and it denies the materiality of the hypothesis presented in paragraph Tenth of the Complaint and the accuracy of the plaintiff's computations based thereon.

Eleventh. The Railway Company admits the allegations contained in paragraph Eleventh of the Bill of Complaint.

[fol. 33] Twelfth. Answering paragraph Twelfth of the Bill of Complaint, the Railway Company denies any purpose to inaugurate regular dividends upon the Preferred Stock "B" and upon the Common Stock of the Railway Company and alleges that the question of dividends upon either of said classes of stock will necessarily be determined by the Board of Directors in the exercise of its proper and lawful discretion from time to time in the light of conditions existing when such discretion is exercised and which, in the nature of things, it is impracticable to forecast or foresee; but the Railway Company denies that the right of the Board to declare and pay dividends upon its Preferred Stock "B" or upon its Common Stock is contingent upon or in any manner related to the payment of dividends upon the Preferred Stock "A" in prior years, and avers in this behalf that it is free in any fiscal year in

which dividends amounting to 5% have been paid upon the Preferred Stock "A" to pay dividends up to 5% upon the Preferred Stock "B" and is free in any fiscal year in which dividends upon the Preferred Stock "B" amounting to 5% have been paid or set apart to declare dividends upon the Common Stock. Accordingly, all averments of threatened wrongful diversion of surplus earnings from the payment of dividends upon the Preferred Stock "A" of the Railway Company are denied.

Thirteenth. Answering paragraph Thirteenth of the Bill of Complaint the Railway Company denies any prejudgment as to its future dividend action but it admits that it will pursue its unqualified right to act upon the declaration and payment of dividends on its Preferred Stock "B" and Common Stock without regard to the qualifications and [fol. 34] limitations inferentially alleged in said paragraph Thirteenth and except as thus admitted, it denies the allegations of paragraph Thirteenth of the Bill of Complaint.

Fourteenth. Answering paragraph Fourteenth of the Bill of Complaint, the Railway Company begs leave to refer to its Certificate of Incorporation and the Certificate for its Preferred Stock "A", true copies of which are annexed to the Bill of Complaint, marked respectively "Exhibit A" and "Exhibit B".

Fifteenth. The Railway Company denies the allegations contained in paragraph Fifteenth of the Bill of Complaint and avers in this behalf that each fiscal year is a separate accounting and dividend period and that it may declare in each such year the dividends specified in its Certificate of Incorporation and in the Certificates representing its Preferred Stock "A", Preferred Stock "B" and Common Stock without regard to the payment or non-payment of dividends upon any of its three issues of stock in previous accounting periods and without regard to the existence or non-existence of earnings in such periods.

Wherefore the Railway Company prays for a dismissal of the Bill of Complaint with its costs most unjustly sustained.

Pierce & Greer, Solicitors for the Defendant Wabash Railway Company, 37 Wall Street, New York City, New York. Charles E. Hughes, Winslow S. Pierce, F. C. Nicodemus, Jr., Counsel.

[fol. 35] *Duly sworn to by John C. Otteson. Jurat omitted in printing.*

[fol. 36] In United States District Court

[Title omitted]

Answer of Gerald V. Hollins, Shirley P. Austin, George R. Leslie, and Earl Krapp

The defendants above-named, Gerald V. Hollins, Shirley P. Austin, George R. Leslie and Earl Krapp, by Hughes, Rounds, Schurman & Dwight, their solicitors, respectfully answer the Bill of Complaint herein, on information and belief, as follows:

First. They admit that Wabash Railway Company is a corporation duly organized and existing under the laws of the State of Indiana and is a citizen and resident of that state, and they admit the citizenship of the plaintiff John C. Barclay and of the individual defendants and admit that Myron S. Hall & Company and C. D. Halsey & Company have offices in the City of New York, as alleged in Paragraph First of the Bill of Complaint.

[fol. 37] Second. They admit the allegations contained in Paragraph Second of the Bill of Complaint.

Third. They admit the allegations contained in Paragraph Third of the Bill of Complaint.

Fourth. They admit the allegations contained in Paragraph Fourth of the Complaint, but for greater certainty beg leave to refer to the Certificate of Incorporation, a true copy of which is annexed to the Bill of Complaint as "Exhibit A" thereto.

Fifth. They admit that the plaintiff is and for several years last past has been the owner and holder of 100 shares of the par value of $100 each of the Five Per Cent. Profit Sharing Preferred Stock A of the Railway Company (herein and in the Bill of Complaint sometimes referred to as Preferred Stock "A") and admit that Myron S. Hall & Company, C. D. Halsey & Company and Earl Krapp are respectively the registered owners or holders of the amounts of stock mentioned in Paragraph Fifth of the Bill of Complaint.

Sixth. They admit that the owners and holders of the Five Per Cent. Convertible Preferred Stock B (herein and in the Bill of Complaint sometimes referred to as Preferred Stock "B") and Common Stock of the Railway Company are numerous and widely scattered, but deny that many of them are unknown to the plaintiff and aver that the plaintiff, through his attorneys, has been given access to and is familiar with the stock books of the Railway Company. They admit that defendants other than the Railway Company have been made parties as representatives of the [fol. 38] holders of Preferred Stock "B" and Common Stock of the Railway Company.

Seventh. They admit the allegations contained in Paragraph Seventh of the Bill of Complaint, but for greater certainty beg leave to refer to said Certificate of Incorporation and the Certificate for Preferred Stock "A", true copies of which are annexed to the Bill of Complaint, marked respectively "Exhibit A" and "Exhibit B".

Eighth. They admit the allegations contained in Paragraph Eighth of the Complaint respecting the payment and non-payment of dividends between the years 1915 and 1926, but they deny that there were large net earnings available for dividends on the Railway Company's Preferred Stock "A" in the period mentioned in said paragraph and deny that its earnings in any part or parts of said period justified the payment of any dividends which were not actually paid, and, although admitting balances of net earnings in certain non-dividend periods over expenses and prior charges, they deny that any part of such balances could, consistently with the Railway Company's lawful obligations to its stockholders, or with its duties to the public

in safe and efficient maintenance of property and service, or with sound discretion and the duty of its directors, have been distributed to stockholders, and aver that the Railway Company's entire surplus earnings of all periods since its incorporation not actually distributed to stockholders and not reserved for working capital or necessary corporate requirements has been actually appropriated to [fol. 39] and is now represented by fixed and permanent improvements and additions to the property and equipment of the Railway Company to enable it adequately to discharge its public duties and protect its property, and that no part of such alleged surplus is represented by any cash or liquid fund or by any accumulation of cash assets available for dividends.

Ninth. They admit the allegations contained in Paragraph Ninth of the Bill of Complaint, except that while admitting that balances of net earnings over expenses and prior charges in the period referred to in said paragraph were carried to its surplus account and used for additional working capital and other purposes, they deny the availability of such surplus for dividends on the Preferred Stock "A."

Tenth. Answering Paragraph Tenth of the Complaint, while admitting balances of net earnings over expenses and prior charges in substantial amounts during the period from its organization to May 25, 1918, they deny the availability of net earnings for dividends upon the Preferred Stock "A" beyond the amounts actually distributed by the Railway Company, and they deny the materiality of the hypothesis presented in Paragraph Tenth of the Complaint and the accuracy of the plaintiffs computations based thereon.

Eleventh. They admit the allegations contained in Paragraph Eleventh of the Bill of Complaint.

[fol. 40] Twelfth. Answering Paragraph Twelfth of the Bill of Complaint, they deny that the Railway Company has any purpose to inaugurate regular dividends upon the Preferred Stock "B" and upon the Common Stock of the Railway Company and allege that the question of dividends upon either of said classes of stock will necessarily be determined by the Board of of Directors of the Railway

Company in the exercise of its proper and lawful discretion from time to time in the light of conditions existing when such discretion is exercised and which, in the nature of things, it is impracticable to forecast or forsee; but they deny that the right of the Board to declare and pay dividends upon the Preferred Stock "B" or upon the common Stock is contingent upon or in any manner related to the payment of dividends upon the Preferred Stock "A" in prior years, and aver in this behalf that it is free in any fiscal year in which dividends amounting to 5% have been paid upon the Preferred Stock "A" to pay dividends up to 5% upon the Preferred Stock "B" and is free in any fiscal year in which dividends upon the Preferred Stock "B" amounting to 5% have been paid or set apart to declare dividends upon the Common Stock. Accordingly, all averments of threatened wrongful diversion of surplus earnings from the payment of dividends upon the Preferred Stock "A" of the Railway Company are denied.

Thirteenth. Answering Paragraph Thirteenth of the Bill of Complaint, they deny any prejudgment by the Railway Company as to its future dividend action, but they admit that it will pursue its unqualified right to act upon the [fol. 41] declaration and payment of dividends on its Preferred Stock "B" and Common Stock without regard to the qualifications and limitations inferentially alleged in said Paragraph Thirteenth and except as thus admitted, they deny the allegations of Paragraph thirteenth of the Bill of Complaint.

Fourteenth. Answering Paragraph Fourteenth of the Bill of Complaint, they beg leave to refer to the Certificate of Incorporation and the Certificate for Preferred Stock "A" of the Railway Company, true copies of which are annexed to the Bill of Complaint, marked respectively "Exhibit A" and "Exhibit B."

Fifteenth. They deny the allegations contained in Paragraph Fifteenth of the Bill of Complaint and aver in this Behalf that each fiscal year is a separate accounting and dividend period and that the Railway Company may declare in each such year the dividends specified in its Certificate of Incorporation and in the Certificates representing its Preferred Stock "A," Preferred Stock "B" and Common

Stock without regard to the payment or non-payment of dividends upon any of its three issues of stock in previous accounting periods and without regard to the existence or non-existence of earnings in such periods.

Wherefore said defendants pray for a dismissal of the Bill of Complaint with their costs most unjustly sustained.

Hughes, Rounds, Schurman & Dwight, Solicitors for the Defendants, Gerald V. Hollins, Shirley P. Austin, George R. Leslie, and Earl Krapp, 100 Broadway, New York City, New York. Charles E. Hughes, Counsel.

[fol. 42] *Duly sworn to by Gerald V. Hollins. Jurat omitted in printing.*

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF MYRON S. HALL, H. W. COHU, AND LA MOTTE COHU

Myron S. Hall, H. W. Cohu and La Motte Cohu, defendants herein, for their answer to the Bill of Complaint of the plaintiff above named, respectfully allege as follows:

First. They admit they are copartners doing business under the firm name and style of Myron S. Hall & Company, having their principal office at 100 Broadway, New York City, New York, and upon information and belief they admit the other allegations of paragraph First of the complaint.

Second. They admit the allegations of the plaintiff as alleged in paragraph Second of the complaint.

[fol. 44] Third. They admit the allegations of the plaintiff as alleged in paragraph Third of the complaint.

Fourth. They admit the allegations contained in paragraph Fourth of the complaint, but for greater certainty beg leave to refer to the certificate of incorporation, a true copy of which is annexed to the Bill of Complaint as Exhibit "A" thereto.

Fifth. They admit that they are the registered holders of 2,197 shares of preferred stock "B" of the Railway Company, and upon information and belief admit the other allegations as alleged in paragraph Fifth of the complaint.

Sixth. They admit the allegations contained in paragraph Sixth of the complaint, except the allegation that many of the owners and holders of the preferred stock "B" and of the common stock of the Railway Company are unknown to the plaintiff, as to which allegation they deny they have knowledge or information sufficient to form a belief as to the truth thereof.

Seventh. They admit the allegations contained in paragraph Seventh of the complaint, but for greater certainty beg leave to refer to the certificate of incorporation and the certificate for the preferred stock "A," true copies of which are annexed to the complaint marked respectively Exhibit "A" and Exhibit "B."

Eighth. They admit upon information and belief, the allegation contained in paragraph Eighth of the complaint [fol. 45] respecting the payment and non-payment of dividends between the years 1915 and 1926; they also admit, upon information and belief, the allegations contained in said paragraph Eighth of the complaint with respect to the net earnings of the Railway Company and, upon information and belief, they aver that said net earnings in some of the fiscal years of said period were sufficient to pay, either in whole or in part, the preferential dividend of five per cent on the said preferred stock "B" of the Railway Company; they deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph Eighth of the complaint with respect to the availability of said net earnings for the payment of dividends upon the preferred stock "A" of the Railway Company.

Ninth. They admit, upon information and belief, the allegation contained in paragraph Ninth of the complaint with respect to the disposition by the Railway Company of its earnings, but deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph Ninth with respect to the

availability of said earnings for dividends on preferred stock "A" of the Railway Company.

Tenth. They deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Tenth of the complaint.

Eleventh. They admit the allegations contained in paragraph Eleventh of the complaint.

[fol. 46] Twelfth. They admit, upon information and belief, that the Railway Company since May 1, 1925, has, in each fiscal year, had net earnings more than sufficient to pay in full the preferential five per cent dividend on its said preferred stock "A," and they aver that the same is likewise true with reference to the preferential dividend on its preferred stock "B"; they deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph Twelfth of the complaint respecting the availability of earnings for the payment of dividends for fiscal years prior to 1926, as to the financial condition of the Railway Company or its intention with respect to the payment of regular dividends upon its preferred stock "B" and common stock; they deny the allegations contained in said paragraph Twelfth to the effect that the right of the Railway Company to declare and pay dividends upon its preferred stock "B" is contingent upon, or in any manner related to, the payment of dividends upon the preferred stock "A" in prior years, or that any such declaration and payment of dividends on the preferred stock "B" would be depriving the holders of preferred stock "A," including the plaintiff, of dividend rights inhering in said preferred stock "A", or diverting from said preferred stock "A" earnings available for dividends thereupon.

Thirteenth. They admit, upon information and belief, the allegations contained in paragraph Thirteenth of the complaint, except that they deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation with respect to the availability of net earn-
[fol. 47] ings for dividends on preferred stock "A" for prior fiscal years.

Fourteenth. Answering paragraph Fourteenth of the complaint, they beg leave to refer to the certificate of incorporation and certificate for the preferred stock "A" true copies of which are annexed to the Bill of Complaint marked respectively Exhibit "A" and Exhibit "B."

Fifteenth. They deny the allegations contained in paragraph Fifteenth of the complaint, and aver in this respect that each fiscal year is a separate accounting and dividend period and that the Railway Company may declare in and for each such year the dividends specified in its certificate of incorporation and in the certificates representing its preferred stock "A," and in the event of its declaring and paying in or for any such fiscal year five per cent upon its preferred stock "A," as specified in its certificate of incorporation, the preferred stock "B" shall thereupon be entitled to receive out of the net earnings of said fiscal year a preferential dividend up to the amount of five per cent before the holders of either preferred stock "A" or common stock are entitled to receive any dividend in and for a succeeding fiscal year and without regard to the payment of non-payment of dividends upon the preferred stock "A" in or for previous fiscal years.

For a separate and distinct defense and claim, these defendants further answer:

Sixteenth. They allege and aver that in the event it be decreed that the holders of preferred stock "A" are en- [fol. 48] titled to receive a dividend of five per cent in and for any specific fiscal year or accounting period during the period from 1915 to 1926 inclusive, that the holders of preferred stock "B" are likewise entitled to receive from net earnings a dividend in and for said specific fiscal year up to five per cent before the holders of either preferred stock "A" or common stock are entitled to receive any dividend in and for a succeeding fiscal year.

Seventeenth. They allege and aver that the Railway Company has declared and paid to holders of its preferred stock "A" a dividend of five per cent in and for the fiscal year 1927 and that there is now due and owing to the holders of preferred stock "B" from available net earnings for the current fiscal year a dividend of five per cent

for the fiscal year of 1927, which said dividend should be declared and paid by the Railway Company.

Wherefore these defendants pray for a dismissal of the complaint herein with respect to the prayer for relief as contained in Sections 3 and 4 of paragraph Sixteenth of the complaint with respect to the issuing of interlocutory and permanent injunctions, and these defendants further pray that in the event this Honorable Court decree that the holders of said preferred stock "A" of the Railway Company are entitled to receive preferential dividends of five per cent for any fiscal year from 1915 to 1926 inclusive, that in such event this Honorable Court decree that the holders of the said preferred stock "B" of the Railway Company are thereupon entitled to receive from the net earnings in [fol. 49] said fiscal year a preferential dividend up to five per cent for such fiscal year, and before the holders of said preferred stock "A" and of common stock are entitled to receive a dividend for any succeeding fiscal year. And these defendants further pray that this Honorable Court decree that the holders of said preferred stock "B" are entitled to receive a preferential dividend of five per cent for the fiscal year 1927 and that the Railway Company should forthwith declare and pay such dividend, and these defendants further pray that they have such other and further relief as may be meet and just in the premises.

Taylor & Roberts, Solicitors for Defendants Myron S. Hall, H. W. Cohu, and La Motte Cohu, 56 Pine Street, New York City, N. Y. Winthrop Taylor, of Counsel.

[fol. 50] *Duly sworn to by Myron S. Hall. Jurat omitted in printing.*

[fol. 51] In United States District Court

[Title omitted]

Order Joining William Fraser Dickson as Party Defendant

Upon reading and filing the consent hereto annexed, it is hereby

Ordered that William Fraser Dickson, a resident of La Anna, Pennsylvania, and owner and holder of more than 1,000 shares of the common capital stock of the defendant, Wabash Railway Company, be, and hereby it, added as a party defendant in the above-entitled cause with the same force and effect as though originally joined as such herein.

Jno. Knox, U. S. D. J.

Dated New York, December 1, 1927.

[fol. 52] In United States District Court

[Title omitted]

Answer of William Fraser Dickson

William Fraser Dickson, a defendant herein, for his answer to the Bill of Complaint of the plaintiff above named, respectfully shows and alleges as follows:

First. He admits, on information and belief, that John C. Barclay, the plaintiff, is a citizen and resident of the State of New Jersey, residing at Montclair in said State. That the defendant, Wabash Railway Company, is a corporation duly organized and existing under the laws of the State of Indiana and is a citizen and resident of said State and has an office at 120 Broadway, New York City; that Myron S. Hall & Co. and C. D. Halsey & Company have offices in the City of New York, as alleged in the First paragraph of the Bill of Complaint.

[fol. 53] Second. He admits the allegation contained in the Second paragraph of the Bill of Complaint.

Third. He admits the allegations contained in the Third paragraph of the Bill of Complaint.

Fourth. He admits the allegations contained in the Fourth paragraph of the Bill of Complaint, but for greater certainty begs leave to refer to the certificate of incorporation, a copy of which is annexed to the Bill of Complaint as Exhibit "A" thereto.

Fifth. He admits that the plaintiff is and since 1926 has been the owner and holder of one hundred (100) shares, each of the par value of $100, of the 5% profit-sharing, Preferred "A" stock of the defendant Railway Company (herein and in the Bill of Complaint sometimes referred to as Preferred Stock "A"), and admits that Myron S. Hall & Company, C. D. Halsey & Company and Earl Krapp are respectively the registered owners or holders of the amount of stock mentioned in paragraph Fifth of the Bill of Complaint.

Sixth. He admits that the owners and holders of the 5% convertible Preferred Stock "B" (herein and in the Bill of Complaint referred to as Preferred Stock "B") and Common Stock of the Railway Company are numerous and widely scattered, but, upon information and belief, denies that many of them are unknown to the plaintiff; and he admits that the defendants, other than the Railway Company, have been made parties as representatives of the holders of Preferred Stock "B" and Common Stock of the Railway Company.

[fol. 54] Seventh. He admits the allegation contained in paragrah Seventh of the Bill of Complaint, but for greater certainty begs leave to refer to its certificate of incorporation and the certificate for its Preferred Stock "A," true copies of which are annexed to the Bill of Complaint marked respectively "Exhibit A" and "Exhibit B."

Eighth. He admits the allegations contained in paragraph Eighth of the Bill of Complaint respecting payment and non-payment of dividends between the years 1915 and 1926, but denies that there were large net earnings available for dividends on its Preferred Stock "A" in the period mentioned in said paragraph, and denies that its earnings in any part or parts of said period justified the payment of any dividends which were not actually paid; and alleges that the application of balances of net earnings over expenses and prior charges by the Railway Company was in all respects proper and in pursuance of the wise and prudent exercise of their discretion by the Directors of said Railway Company. The defendant admits balances of net earnings in certain non-dividend periods over and above

expenses and prior charges, but denies that they were available for or could have been by the Directors properly applied to the payment of dividends upon the stock of the said Railway Company (except to the extent that they were actually so applied), or that consistent with its legal obligations to its stockholders and its duties to the public in connection with the exercise of a sound discretion by its Directors in the exercise of their duties, such balances, or any part thereof, could have been distributed to the stockholders, and alleges, upon information and belief, that the [fol. 55] surplus earnings of the Railway Company not actually distributed to stockholders and not reserved for working capital or necessary corporate requirements, has been properly appropriated to and is now represented by fixed and permanent improvements and additions to the property and equipment of the Railway Company to enable it adequately to discharge its duties as a common carrier and protect its property, and that no part of such alleged surplus is represented by cash or other assets available for dividends.

Ninth. He denies that the earnings of the Railway Company referred to in paragraph Ninth of the Bill of Complaint were available for dividends on the Preferred Stock "A" during the periods therein referred to, or that they are so available now; but admits that earnings during the periods therein referred to were retained by the Railway Company and carried to a surplus account and used for additional working capital and other purposes, which he alleges were in all respects proper and so applied by the Directors in a wise exercise of their discretion.

Tenth. Answering the paragraph Tenth of the Bill of Complaint, he admits that the Railway Company had balances of net earnings over expenses and prior charges in substantial amounts during the period from its organization to May 25th, 1925, but denies the availability of such net earnings for dividends upon Preferred Stock "A" beyond the amounts actually distributed by the Railway Company. He denies the accuracy of the plaintiff's computation set forth in the said paragraph of the Bill of Com- [fol. 56] plaint, but admits that surplus net earnings were during said period carried by the Railway Company to sur-

plus account and used for additional working capital and other proper corporate purposes.

Eleventh. He admits the allegations contained in paragraph Eleventh of the Bill of Complaint.

Twelfth. Answering paragraph Twelfth of the Bill of Complaint, he admits that the Railway Company since May 1st, 1925, has had in each year net earnings in amounts in excess of an amount equal to 5% upon its outstanding Preferred "A" Stock, but denies that such net earnings were available for the payment of dividends upon the Preferred "A" Stock except to the extent that they were during said period actually so applied. He admits that the Railway Company is now in strong financial position, but denies that it no longer needs to retain a substantial surplus or that its net earnings in prior fiscal years were available for dividends upon its Preferred "A" Stock which were unpaid in such years. He denies that the payment of dividends upon the Preferred "B" and Common Stock of the Railway Company would in any way deprive holders of the Preferred "A" Stock of any rights inherent therein and denies that it would divert from said Preferred "A" Stock net earnings available for dividends thereon which were not paid; and he alleges that the question of dividends to be paid upon its various classes of stock must necessarily be determined by the Board of Directors of said Railway Company in the exercise of a wise and proper discretion from time to time, and that the right of said directors to [fol. 57] declare and pay dividends upon its Preferred "B" and its Common Stock is not contingent upon or in any manner related to the payment of dividends upon the Preferred Stock "A" in prior years and that the said Board of Directors is free in any fiscal year in which dividends amounting to 5% upon the Preferred Stock "A" are declared, to pay dividends up to 5% upon the Preferred Stock "B," which having been paid or set apart and there remaining sufficient net earnings thereto available, to declare and pay dividends upon the Common Stock, and he denies all averments of threatened alleged wrongful diversion of surplus earnings from the payment of dividends upon the Preferred Stock "A" of the Railway Company.

Thirteenth. Answering paragraph Thirteenth of the Bill of Complaint, he alleges that the Railway Company had the right to pay the dividends upon the Preferred "B" Stock which have hitherto been paid or declared, and that it has the right to pay future dividends thereon and on the Common Stock in each fiscal year out of its net earnings in such fiscal year remaining after the payment of a 5% dividend on its said Preferred Stock "A" in said fiscal year and wholly without regard to the question as to whether or not dividends on such Preferred Stock "A" have been paid in prior fiscal years and whether or not in such prior fiscal years net earnings were available for the payment of dividends on such Preferred Stock "A."

Fourteenth. Answering paragraph Fourteenth of the Bill of Complaint, he denies that to the extent that in any [fol. 58] fiscal year the Railway Company has had net earnings equivalent to or in excess of an amount equal to 5% upon its outstanding Preferred "A" Stock but such dividend has not been paid thereon, the holders of said stock are entitled to receive such unpaid dividends before any dividends may be declared or paid by the Railway Company to the holders of stock of any other class in any subsequent year, and for a greater certainty in respect to the legal obligations of the Railway Company with respect to the dividend rights of its various classes of stockholders he begs leave to refer to the certificate of incorporation and the certificate of its Preferred Stock "A," copies of which are annexed to the Bill of Complaint marked respectively "Exhibit A" and "Exhibit B."

Fifteenth. He denies each and every of the allegations contained in paragraph Fifteenth of the Bill of Complaint and alleges that under the terms of its articles of incorporation each fiscal year is a separate accounting and dividend period of the Railway Company, and that it may declare in each such year the dividends specified therein and in its certificates representing its various classes of stock without regard to the payment or non-payment of dividends upon any of its three issues of stock in previous accounting periods and without regard to the existence or non-existence of earnings in such period.

Sixteenth. Answering paragraph Sixteenth of the Bill of Complaint, he alleges, upon information and belief, that the plaintiff has been in no manner injured by the matters com-
[fol. 59] plained of in the said Bill of Complaint, and is therefore not entitled to the relief prayed for or any part thereof.

Seventeenth. And he further alleges that he is a resident of La Anna, Pennsylvania, is and has for several years last past been the owner and holder of more than 1,000 shares of the common stock of the defendant Wabash Railway Company, and that he was added as a party defendant to this action by order of the above court on December 1st, 1927, and with the same force and effect as though originally joined as such a party herein.

Wherefore the defendant William Fraser Dickson prays for a dismissal of the Bill of Complaint with his costs most unjustly sustained.

Davis, Wagner, Heater & Holton, Solicitors for the Defendant William Fraser Dickson. Office and Postoffice address: 120 Broadway, Manhattan New York City. Arnold L. Davis, of Counsel.

[fol. 60] *Duly sworn to by William Fraser Dickson. Jurat omitted in printing.*

[fol. 61] In United States District Court

[Title omitted]

Notice of Motion for Interlocutory Injunction

Please take notice that upon the Bill of Complaint herein, verified the 15th day of November, 1927, the Answer of defendant Wabash Railway Company, verified the 28th day of November, 1927, the Answer of defendants Myron S. Hall, H. W. Cohu and La Motte Cohu, verified the 29th day of November, 1927, all filed herein, and upon the Affidavit of William R. Begg, sworn to the 6th day of December, 1927, the undersigned will move this Court at a term thereof for motions to be held at the Old Post Office Build-

ing, Broadway and Park Row, Borough of Manhattan, New York City, on the 13th day of December, 1927, at the opening of Court on that day or as soon thereafter as counsel can be heard for an interlocutory injunction enjoining and restraining the Railway Company, its agents, attorneys, servants and officers temporarily and pending the determination of this suit from declaring or paying any dividends upon the Preferred Stock B of said Railway Company or any dividends upon the Common Stock thereof [fol. 62] unless there shall first have been paid all the preferential dividends at the rate of five per cent in each fiscal year upon its Preferred Stock A from the date of the organization of the Railway Company down to and including the fiscal year 1926 to the extent that the Railway Company has had net earnings available for the payment of such dividends and to the extent that such dividends remain unpaid, and for such other and further relief as to the Court may seem just and proper.

Dated December 6, 1927.

William R. Begg, Solicitor for Plaintiff. Office & P. O. address: 24 Broad Street, Borough of Manhattan, New York City.

To Pierce & Greer, Esqs., Attorneys for Defendant Wabash Railway Company, 37 Wall Street, New York City; Hughes, Rounds, Schurman & Dwight, Esqs., Attorneys for Defendants Gerald V. Hollins, Shirley P. Austin, George R. Leslie, and Earl Krapp, 100 Broadway, New York City; Taylor & Roberts, Esqs., Attorneys for Defendants Myron S. Hall, H. W. Cohu, and La Motte Cohu, 56 Pine Street, New York City; Davis, Wagner, Heater & Holton, Esqs., Attorneys for Defendant William Fraser Dickson, 120 Broadway, New York City.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM R. BEGG IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

William R. Begg, being first duly sworn, on oath deposes and says:

1. I am the solicitor for the above-named plaintiff, John C. Barclay. On Wednesday, November 30, 1927, defendant Wabash Railway Company declared a dividend of five per cent on its Five Per Cent Convertible Preferred Stock B out of the net earnings of said defendant for 1927, payable February 6, 1928, to holders of such stock of record at the close of business on December 31, 1927. The declaration of [fol. 64] said dividend has been announced in the press and said dividend will be paid by said defendant on February 6, 1928, unless payment thereof is enjoined by this Court.

2. The net earnings of the defendant Wabash Railway Company, after deducting all operating expenses, rentals, taxes, interest, hire of equipment and all other fixed or prior charges, which constituted surplus and were available for dividends for the fiscal years ended December 31, 1916, to December 31, 1926, both inclusive, were as follows:

1916	$5,390,908	
1917	4,427,105	
1918	5,668,339	
1919	2,548,951	(deficit)
1920	7,369,827	(deficit)
1921	2,017,576	
1922	1,210,388	
1923	5,410,873	
1924	5,474,949	
1925	7,946,438	
1926	8,217,427	

3. In the fiscal years below mentioned there were outstanding of defendant Railway Company's Five Per Cent

Profit Sharing Preferred Stock A (hereinafter called "Preferred Stock A") the number of shares below stated:

1916	462,000	shares
1917	462,000	"
1918	594,645	"
1921	650,984	"
1922	662,782	"
1923	668,376	"
1924	678,850	"
1925	693,058	"
1926	693,330	"

[fol. 65] 4. In every one of the fiscal years above mentioned, except the years ended December 31, 1919, to December 31, 1922, both inclusive, the defendant Wabash Railway Company had available for dividends surplus net earnings more than sufficient to pay in full the preferential five per cent dividend on said Preferred Stock A. In the years ended December 31, 1921, and 1922 said defendant had surplus net earnings available for the payment of said preferential dividends on the Preferred Stock A in part but not in full. In the years ended December 31, 1919 and 1920 said defendant had no net earnings.

5. Out of its surplus net earnings for the fiscal year 1916 the defendant Railway Company paid one per cent only on account of the preferential dividend upon its Preferred Stock A. Out of its surplus net earnings of 1917 it paid only four per cent on account of said preferential dividend on such stock. It paid no dividend on said Preferred Stock A out of the surplus net earnings available for such dividend for the years 1918, 1921, 1922, 1923 and 1924. Out of its surplus net earnings for the year 1925 it paid four per cent on account of said preferential dividend and since 1925 has paid such preferential dividend in full.

The facts above stated with respect to the net earnings of the defendant Railway Company available for dividends for the fiscal years mentioned and with respect to the number of shares of Preferred Stock A of said defendant outstanding in each year and the amount paid out by the defendant in each year on account of preferential dividends on said

Preferred Stock A have been taken for the years 1916, 1917, [fol. 66] 1925 and 1926 from Moody's Manual of Railroads and for all the other years from Poor's Manual of Railroads. These Manuals are standard publications in general use for statistical purposes and are generally relied upon as accurate.

Annexed hereto marked Exhibit A is a schedule, based on the facts above stated, showing in tabular form the surplus net earnings available in each fiscal year, other than 1919 and 1920, for dividends, the number of shares of Preferred Stock A outstanding in such year, the amount required to pay in full the preferential dividend of five per cent for such year on said Preferred Stock A outstanding in such year, the amount actually paid on account of such preferential dividend in such year and the amount earned on account of such dividend in such year but not paid.

William R. Begg.

Sworn to before me this 6th day of December, 1927. Redmond F. Kernan, Jr., Notary Public, New York County, No. 462. New York County Register's No. 8067A. Certificate filed in Kings County No. 222. Kings County Register's No. 8376. Commission expires March 30, 1928.

EXHIBIT "A" TO AFFIDAVIT OF W. R. BEGG

Year	Net earnings available for dividends	Shares of preferred A outstanding	Preferential dividend requirement, preferred A	Dividends paid	Dividends earned but not paid
1916	$5,390,908	462,000	$2,310,000	$462,000	$1,848,000
1917	4,227,105	462,000	2,310,000	1,848,000	462,000
1918	5,668,339	594,645	2,973,225	Nothing	2,973,225
1921	2,017,576	650,984	3,254,920	Nothing	2,017,576
1922	1,210,388	662,782	3,313,910	Nothing	1,210,388
1923	5,410,873	668,376	3,341,880	Nothing	3,341,880
1924	5,474,942	678,850	3,394,250	Nothing	3,394,250
1925	7,946,438	693,058½	3,465,292	2,585,361	879,931
Total preferential dividends earned, but unpaid					$16,127,250

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MYRON S. HALL IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss:

Myron S. Hall, being duly sworn, on oath deposes and says:

(1) I am a defendant in this action and represent the firm of Myron S. Hall & Company, the holders of 2197 shares of preferred stock "B" of the defendant Railway Company.

(2) Annexed hereto and made a part hereof marked Exhibit "A" is a schedule showing in tabular form (a) the surplus net earnings of the Railway Company for the years 1916-1926 inclusive, after allocation of $5 per share to the [fol. 68] number of shares of preferred stock "A" outstanding in each of said years; (b) the number of outstanding shares of preferred stock "B" in each of said years; (c) the amount of money necessary to have been earned to pay $5 per share on outstanding preferred stock "B" in each of said years; (d) the total amount of money actually earned up to $5 per share on the outstanding shares of preferred stock "B" in each of said years; (e) the amount of money actually earned on each share of outstanding preferred stock "B" in each of said years, including statement of dividends paid and unpaid.

The figures and facts contained in said Exhibit "A" are from the official financial statements of the defendant Railway Company.

(3) There are now outstanding 24621 shares of preferred stock "B" on which the full dividend of $5 in a fiscal year amounts of $123,105. For the fiscal year 1927 a dividend of $5 has been declared and paid to the holders of preferred stock "A." A dividend of $5 on the outstanding shares of preferred stock "B" was declared by the directors of the defendant Railway Company on November 30th, 1927, payable February 6th, 1928. This dividend amounts to $123,105.

(4) The surplus of the defendant Railway Company as of January 1, 1927, was approximately $38,000,000. The current net earnings of the defendant Railway Company are running at the rate of well over $100 per share on the said outstanding shares of preferred stock "B"; this is after deducting payment from the net earnings $5 per share on outstanding preferred stock "A." (Standard Statistics report current net earnings on preferred stock "B" [fol. 69] of $118 per share). The claim of the plaintiff for the payment of preferential dividends on the preferred stock "A" for prior years 1916-1925 inclusive totals, according to the tabulation annexed to the affidavit of Mr. William R. Begg on this application, $16,127,250.

It is apparent from the foregoing that no irreparable injury will result to the plaintiff by the payment of the dividend of $123,105 on the outstanding shares of preferred stock "B" as declared by the directors of the defendant Railway Company, payable February 6th, 1928. This case is now at issue and can be heard and definitely determined within the next few months. There exists no substantial equitable reason for the granting of an interluctory injunction restraining the payment of the dividend on the preferred stock "B" and the failure to issue such an injunction will not jeopardize the payment of dividends for prior years on preferred stock "A" in the event that the plaintiff's claim in this respect is established.

On the other hand the granting of an interlocutory injunction will not only hold up the payment to the holders of the "B" stock of the dividend declared thereupon as aforesaid, but in my opinion will have the effect of depreciating the market value of the said "B" stock and thus substantially damage the owners thereof.

Myron S. Hall.

Sworn to before me this 14th day of December, 1927.
Mary Monahan, Notary Public, New York County,
No. 815. Kings County No. 729.

[fol. 70]

EXHIBIT "A" TO AFFIDAVIT OF M. S. HALL

Wabash Railway Company

	(a) Actual net earnings after allocation of $5 per share to "A" shares	(b) Outstanding "B" shares	(c) Amount necessary to have been earned to pay dividend of $5 per share on outstanding "B" shares	(d) Actual net earnings on outstanding "B" shares	(e) Amount earned per share on outstanding "B" shares
1916	$2,996,498	487,261	$2,436,305	$2,436,305 no dividend paid	$5.00 not paid
1917	1,862,045	487,281	2,436,406	1,862,045 "	3.83 "
1918	0	221,991	1,109,956	0 "	0 "
1919	0	167,540	837,702	0 "	0 "
1920	0	127,594	637,972	0 "	0 "
1921	0	109,314	546,572	0 "	0 "
1922	0	85,718	428,592	0 "	0 "
1923	2,068,993	74,530	372,652	372,652 "	5.00 "
1924	2,080,699	53,982	269,912	269,912 "	5.00 "
1925	4,481,146	26,521	133,607	133,607 "	5.00 "
1926	4,759,062	25,002	125,010	125,010 paid as dividends	5.00 paid
				$5,074,521—total net earned but not applied to dividends on "B" stock.	

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT

And now comes William F. Dickson, a defendant in the above cause, and moves the court to dismiss the bill of complaint filed in this cause, because said bill does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts as stated therein sufficient to entitle the plaintiff to the relief prayed for against the defendants or any of them or, in particular, against the defendant Wabash Railway Company.

Wherefore, defendant prays the judgment of this court whether he shall further answer, and that he be dismissed with his costs.

Davis, Wagner, Heater & Holton, Solicitors for Defendant William F. Dickson, 120 Broadway, Borough of Manhattan, City of New York. Arnold L. Davis, of Counsel.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER WITHDRAWING MOTION TO DISMISS COMPLAINT

It is hereby stipulated and agreed by and between the undersigned that the motion to dismiss the complaint herein, notice of which was heretofore served and filed herein on behalf of the defendant, William Fraser Dickson, may be withdrawn without prejudice and the said defendant permitted to answer the complaint herein, and that an [fol. 73] order to this effect may be entered hereon without further notice.

Dated New York, December 22, 1927.

Wm. R. Begg, Attorney for Plaintiff. Pierce & Greer, Attorneys for Defendant Wabash Railway Company. Taylor & Roberts, Attorneys for Defendant Myron S. Hall et al. Hughes, Rounds, Schurman & Dwight, Attorneys for Defendant Gerald V. Hollins et al. Davis, Wagner, Heater & Holton, Attorneys for Defendant William Fraser Dickson.

So ordered December 28, 1927. F. A. Winslow, U. S. D. J.

[fol. 74] In United States District Court

[Title omitted]

Order that Motion for an Interlocutory Injunction be Considered One for Decree on Pleadings

Pursuant to the suggestion of this Court and to the agreement between counsel made in open court December 23, 1927, and upon the withdrawal by the defendant William Fraser Dickson of his motion to dismiss the complaint herein and upon the service of his answer to said bill of complaint it is hereby requested by all parties hereto that the Court consider the motion made by the plaintiff before it on December 23, 1927, a motion for decree on the pleadings rather than a motion for an interlocutory injunction [fol. 75] as stated in the Notice of Motion.

Dated December 28, 1927.

Wm. R. Begg, Solicitor for Plaintiff. Pierce & Greer, Attorneys for Defendant Wabash Railway Company. Taylor & Roberts, Attorneys for Defendant Myron S. Hall et al. Hughes, Rounds, Schurman & Dwight, Attorneys for Defendant Gerald V. Hollins et al. Davis, Wagner, Hunter & Holton, Attorneys for Defendant William Fraser Dickson.

So ordered December 28, 1927. F. A. Winslow, U. S. D. J.

[fol. 76] In United States District Court

[Title omitted]

Decree Dismissing Bill of Complaint

This cause coming on to be heard on the motion of the plaintiff John C. Barclay for an interlocutory injunction as prayed in the plaintiff's bill of complaint; and the plaintiff

having in open court agreed to withdraw said motion and instead to treat his said motion as one for a final decree on the bill of complaint and the answers filed thereto by the defendants, provided the intervener, William Fraser Dickson, would withdraw his motion to dismiss the complaint and file an answer substantially similar to the answer already filed by Wabash Railway Company, and thereafter the defendant, William Fraser Dickson, having withdrawn his motion to dismiss the bill of complaint and having filed such an answer; and thereupon all parties having agreed by written stipulation dated and filed in this Court on De-
[fol. 77] cember 28, 1927, that the cause be submitted for final decree on the bill of complaint and the answers thereto of the defendants, and having heard William R. Begg in support of a motion for decree in favor of the plaintiff, and Charles E. Hughes, Waithrop Taylor and Arnold L. Davis in support of a motion for decree in favor of the defendants dismissing the complaint on the merits; and the Court having duly considered the cause and being fully advised in the premises and having filed his opinion herein, now upon motion of counsel for the defendants, it is accordingly

Ordered, adjudged and decreed that the bill of complaint of the plaintiff be and the same is hereby dismissed on the merits.

Francis A. Winslow, United States District Judge.

[fol. 79] In United States District Court, Southern District of New York

In Equity. No. 43-298

John C. Barclay, Plaintiff,

against

Wabash Railway Company, Myron S. Hall, H. W. Cook, Le Motte T. Cobb, Gerald V. Hollins, Shirley P. Austin, George R. Leslie, Earl Krupp, and William F. Dickson, Defendants

Appearances:

Wm. R. Begg, Solicitor for Plaintiff (Hornblower, Miller & Garrison, of Counsel);

Charles E. Hughes, Winslow S. Pierce, and F. C. Nicodemus, Jr., Counsel for Defendant Wabash Railway Company;

Charles E. Hughes, Counsel for Defendants Gerald V. Hollins, Shirley P. Austin, George R. Leslie, and Earl Krapp;

Davis, Wagner, Heater & Holton, Solicitors for Defendant William Fraser Dickson (Arnold L. Davis of Counsel);

Winthrop Taylor, Counsel for Defendants Myron S. Hall, H. W. Cohu, and La Motte Cohu.

OPINION

WINSLOW, D. J.:

[fol. 79] This is a suit by John C. Barclay, as a holder of Five Per Cent Profit Sharing Preferred Stock A of the Wabash Railway Company, suing on behalf of himself and other holders of Preferred Stock A to obtain a decree adjudging that "the holders of said Preferred Stock A of the Railway Company are entitled to receive preferential dividends up to the amount of five per cent for each fiscal year from 1915 to 1926, inclusive, to the extent that such dividends were earned in such fiscal years, but were unpaid,—but not in excess of five per cent for any fiscal year,—before any dividends be paid by the Railway Company upon any other class of its stock," etc.

The matter originally came on for hearing on plaintiff's motion for an interlocutory injunction restraining the Railway Company, etc., pending the determination of the suit, from declaring or paying any dividends upon the Preferred B stock of the Company, or any dividends on the Common Stock unless there shall have first been paid all of the preferential dividends at the rate of five per cent in each fiscal year upon its Preferred Stock A from the date of the organization of the Railway Company down to and including the fiscal year 1926 to the extent that the Railway Company has had net earnings available for the payment of such dividends and to the extent that such dividends remain unpaid.

On the argument for interlocutory injunction, pursuant to the suggestion and the agreement between counsel and with the Court's approval, it was stipulated that the inter-

vening defendant Dickson might serve an answer substantially the same as the answer interposed by the Railway Company, whereon the cause would stand submitted on the [fol. 80] pleadings. Such answer was forthwith served, and all parties now move for final decree on the undisputed facts.

Diversity of citizenship exists between the plaintiff and defendants. The Wabash Railway Company was organized under the Laws of the State of Indiana on or about October 22, 1915, pursuant to an "Act of the General Assembly of the State of Indiana approved March 3, 1865." The Railway Company operates a railway system within the States of Ohio, Illinois, Indiana, Iowa and Missouri. Under its certificate of incorporation, three classes of stock have been issued, which may be referred to as (1) Five Per Cent Profit Sharing Preferred Stock A; (2) Five Per Cent Convertible Preferred Stock B; and (3) Common Stock.

The Preferred Stock B is, by its terms, convertible into Five Per Cent Profit Sharing Preferred A (hereinafter called "Preferred Stock A"), and Common Stock of the Railway Company at the rate of one-half share of Preferred Stock A and one-half share of Common Stock for each share of Preferred Stock B.

The plaintiff is the owner and holder of 100 shares of the par value of $100 each of said Preferred Stock A. Defendants Hall, Cohu and Cohu are the owners and holders of Preferred Stock B (par value $100 each). The defendants Hollins, Austin, Leslie and Krapp are the owners of Common Stock (par value $100 each). These defendants are made parties defendant, respectively, as representatives of the holders of Preferred Stock B, and of the Common Stock.

The rights of the three classes of the stock of the Rail- [fol. 81] way Company to dividends are set forth in Article "Fourth" of the certificate of incorporation annexed to the complaint, and also in the certificates issued by the Railway Company for the several classes of stock, copies of which are also annexed. The certificate of incorporation provides:

"Fourth. The Five Per Cent Profit Sharing Preferred Stock A shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent before any dividends shall be paid upon any other stock of this

corporation, but such dividends on the Five Per Cent Profit Sharing Preferred Stock A shall be non-cumulative. After the payment or the setting apart in any one fiscal year of five per cent dividends upon the Five Per Cent Convertible Preferred Stock B and upon the Common Stock of this corporation, the Five Per Cent Profit Sharing Preferred Stock A shall be entitled to receive additional dividends at the same rate per cent as any further or additional dividends which may be declared in that year upon such Common Stock, * * *"

No dividends were declared or paid by the Railway Company upon its said Preferred Stock A during the period from 1915 until January 29, 1917, on which date the Railway Company declared and paid a dividend of 1% upon its said Preferred Stock A, and a like dividend of 1% thereon quarterly thereafter to and including April 30, 1918. From April 30, 1918, to May 25, 1925, no dividends were paid upon the Preferred Stock A. On May 25, 1925, the Railway Company paid a quarterly dividend of one and one-quarter per cent upon its Preferred Stock A and a like dividend quarterly thereafter to date, such amount representing dividends of five per cent in each fiscal year since [fol. 82] May 25, 1925, upon said Preferred Stock A.

The answer admits balances of net earnings in certain non-dividend periods over expenses and prior charges, but denies that such net earnings could, within the sound discretion of its directors, have been distributed to stockholders, and avers that its entire surplus earnings for all of the periods, not actually distributed to stockholders and not reserved for working capital or necessary corporate requirements, has been actually appropriated to, and is now represented by fixed and permanent improvements, etc.

Paragraph "Ninth" of said complaint alleges that:

"The earnings of each fiscal year available for dividends on said Preferred Stock A of the Railway Company in each year in which the Company declared no dividends or declared dividends of less than five per cent on said Preferred Stock A, were retained by the Railway Company and carried to its surplus account and used for additional working capital and for other purposes."

It is further alleged that during the period the aggregate of preferential dividends of five per cent in each fiscal year upon the Preferred Stock A to the extent that the Railway Company had in each fiscal year during the period net earnings available for the payment of such dividends amounted to more than $16,000,000, in excess of the dividends declared and paid by the Railway Company upon said Preferred Stock A, but that (Paragraph "Tenth," Complaint)

"all of said sum of $16,000,000 available for such dividends, but unpaid therefor, was carried to the surplus of the Rail- [fol. 83] way Company and used for additional working capital and for other proper corporate purposes."

This is admitted by the answer, except it denies the availability of such surplus for dividends on Preferred Stock A.

The Railway Company paid no dividends upon its Preferred Stock B from its organization until April 1, 1927, on which date the Railway Company paid a dividend of five per cent upon its Preferred Stock B, but no dividend thereon has been paid since, and no dividends have been paid on its Common Stock.

And it is alleged that the Railway Company threatens to, and will unless restrained, at once inaugurate the payment of regular dividends upon its Preferred Stock B and upon its Common Stock out of its earnings or surplus without having first made good and paid out of such surplus full preferential dividends of five per cent in each fiscal year upon its Preferred Stock A to the extent that such preferential dividends were earned in each fiscal year, but were not paid in full, and it is alleged that such contemplated act will deprive the holders of the said Preferred Stock A of the dividend rights inhering to said Preferred Stock A and diverting from said Preferred Stock A net earnings available for said preferential dividends thereon which were not paid.

The answers admit all of the material allegations of the complaint, except that they deny that the earnings of the Railway Company in non-dividend periods which were used for permanent improvements and additions to the Railway Company's property and carried into surplus, were available for dividends. The answer avers that the Railway

[fol. 84] Company is free in any fiscal year in which dividends amounting to 5% have been paid upon the Preferred Stock A, to pay dividends on Preferred Stock B up to 5%, and set apart or declare dividends on the Common Stock, and that such payments are unrelated to payment of dividends upon Preferred A Stock in prior years.

The plaintiff, on his part, by moving for final decree, admits many other allegations of the Railway Company's answer, including the allegation:

"that its entire surplus earnings of all periods since the incorporation of the Railway Company not actually distributed to stockholders and not reserved for working capital or necessary corporate requirements has been actually appropriated to and is now represented by fixed and permanent improvements and additions to the property and equipment of the Railway Company, to enable it adequately to discharge its public duties, to protect its property, and that no part of such alleged surplus is represented by any cash or liquid fund or by any accumulation of cash assets available for dividends."

The fundamental question to be determined is whether it be true, as asserted by the plaintiff, that the holders of the non-cumulative Preferred Stock A of the Railway Company are vested with an absolute right to preferential dividends up to five per cent in each fiscal year to the extent that the Railway Company has in such year net earnings available for such dividends, and whether this right attaches to such earnings if such declared dividends are not adequate.

There is no contention that the directors have not acted in good faith and with reasonable regard for the needs [fol. 85] of the corporation. Good faith is not now in issue. The declaration of dividends is a matter of sound discretion of the directors acting in good faith. This general rule is applicable alike to Common Stock as well as Preferred Stock and is subject to the proviso only that no statute limits or controls their action or valid contract places an obligation upon them to do otherwise.

The legislature of Indiana (Act, Feb. 28, 1893) made special provisions for preferred stock issued by industrial and other corporations. But this statute by its express

terms is inapplicable to any Company which by existing law is authorized to issue preferred stock. The defendant Railway Company was incorporated under a different statute (Act of March 3, 1865), providing for the creation of railroad corporations in reorganization (Burns' Stat. 1914, Secs. 5333-5339). The statute under which the Railway Company is incorporated authorizes the corporation to establish preference in respect to dividends in favor of different classes of stock and to secure the same in such manner and to such extent as the corporation may deem expedient. The lawful discretion of the Board of Directors is unfettered by statute.

The plaintiff further contends that the holder of Preferred A Stock is entitled to preferential dividends as a matter of right under his contract, and that the words "non-cumulative" imply but one condition, namely, that the Railway Company shall have net earnings in any particular year available for the preferential dividends for such year. I do not understand that to be the rule here applicable. If the discretion of the directors be exercised within reason [fol. 86] and the profits which might otherwise be available for dividends be used to improve and equip the corporate property, that discretion, unless limited by valid contract, will not be interfered with.

Paragraph "Fourth" of the certificate of incorporation provides for a non-cumulative "dividend." If a dividend is not declared in any given year, or if less than five per cent. is so declared, a debt for the undeclared dividend is not thereby created. The valid declaration of a dividend by the Board of Directors creates a debt, but the mere ascertainment of net profits does not create such an obligation. The dividend preference not being cumulative, but only preferential "in each fiscal year up to the amount of five per cent before any dividend shall be paid upon any other stock of this corporation," etc., an undeclared dividend is not to be piled up or accumulated so that payment of the accumulation is a condition precedent to the declaration of dividends on subordinate issues. If there were doubt in my mind as to the status of this Preferred A Stock, the case of N. Y. Lake Erie & Western R. R. Co. v. Nickals, 119 U. S. 296, would resolve that doubt and be decisive. See also Continental Ins. Co. v. U. S., 259 U. S. 156. I agree with

counsel that the latter case is authority for the proposition that there is no right to dividends which are dependent upon a declaration and payable out of the profits of a particular year, unless they are declared by the directors in the proper exercise of their discretion.

Counsel for defendants have pertinently cited the decision of Judge Crump in Norwich Water Power Co. v. Southern Ry. Co., 11 Virginia Law Register (N. S.) 203, where the precise questions here at issue are exhaustively discussed. [fol. 87] The learned Judge in substance holds that, as a general proposition,

"where the dividends are made non-cumulative, the presumed intention is that unpaid dividends in any one or more years were not to accumulate, but, if they were not declared and paid as dividends in any one year, they were lost to stockholders, * * * Where the dividends are declared to be non-cumulative, that phrase carried with it the general idea that the dividends, if not declared and paid within any one year although earnings exist for that year, are lost to the preferred stockholders; that is that non-cumulative means that the right to the dividend is measured by the Board of Directors in any one year, and the failure to declare the dividend in any one year prevents it from accumulating as a further charge upon the earnings of the company then existing or which may be subsequently acquired."

The learned Judge adds (and I think it may not be questioned) that this general rule may be modified by the charter. Nor will it be questioned that the rule might be controlled by statute.

The contract in the instant case does not, to my mind, fetter the sound discretion of the directors nor give the preferred stockholders a continuing, accumulating obligation or liability, which must ultimately, at all events, be discharged. No absolute right exists to resort to earnings of prior years for undeclared dividends. Any other view in the cause would necessitate utter disregard of the reasonable intent and meaning of the language of the non-cumulative provision.

I think the citations of authorities that at first blush seem to run counter to the expressed view, tend, rather, to sup-

port my conclusion, or are distinguishable from the case at [fol. 88] bar. In Collins v. Portland Elec. Power Co., 12 Fed. (2d) 671, at p. 675, the Court held (citing 14 C.J. 421), that

"where the dividends are non-cumulative, and no profits are made in a particular year, the preferred 'stockholders are not entitled to have the dividends for that year made up out of the profits made in subsequent years.' Conversely, it follows that, where profits are made in a particular year, and they are not devoted to some corporate purpose, there is no reason why directors may not in a subsequent year declare dividends and pay them."

In that case, the directors did declare a dividend for an antecedent year from available surplus profits which had not been used for corporate purposes. In the case at bar, the directors have not declared the sought for dividend, and the sum alleged to have been available for such dividend has been "used for additional working capital and for other proper corporate purposes." (Bill of Complaint, par. "Tenth".) As to whether the directors of the defendant Railway Company may have had the power to declare a dividend out of earnings of a prior year, instead of using the funds for other corporate purposes, it is not now necessary to determine. They did not do so.

Wood v. Levy, 47 Hun. 550, cited by plaintiff, rests upon the certificate which the Court held "places the question of these (stockholders) rights beyond the discretion of the directors" * * *, and thus it is not governed by the rule in New York, &c. v. Nickals (supra).

Burk v. Gas &c. Co., 123 Pac. 857, dealt with what was really a guaranteed dividend.

[fol. 89] The various citations by plaintiff of cases arising in New Jersey bear upon statutes of that state controlling the action of directors.

The plaintiff erroneously assumes that the Indiana statute, enacted in 1893, and similar to that of New Jersey, is applicable. As already stated by its very terms, the Indiana statute of 1893 is not applicable to this railroad corporation organized under a prior statute.

I am of the opinion that in the instant case, the non-cumulative preferred dividend is not a fixed charge upon net earnings.

The case having been submitted on the pleadings on motion for final decree, it is adjudged, in accordance with this opinion, that a final decree issue in favor of the defendants dismissing the bill on the merits.

New York, January 12, 1928.

Francis A. Winslow, U. S. District Judge.

[fol. 90] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF WILLOUHBY COMPANY, INTERVENOR

To the Honorable Judges of the District Court of the United States, For the Southern District of New York:

The petition of the Willoughby Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and citizen of said State, having its principal office in the City of Wilmington in said State, humbly complaining of John C. Barclay, plaintiff, and Wabash Railway Company, Myron S. Hall, H. W. Cohu, LaMotte Cohu, Gerald V. Hollins, Shirley P. Austin, George R. Leslie, Earl Krapp and William Fraser Dickson, defendants in the above cause, would show unto your Honors that John C. Barclay, plaintiff, did, on the 16th day of November, A. D. 1927, file his bill in this cause, wherein [fol. 91] he alleged that he was a holder of 5% profit-Sharing Preferred Stock A of Wabash Railway Company, and brought this suit on his own behalf and on behalf of other holders of said Preferred Stock A, to obtain a decree adjudging, inter alia, that

"the holders of said Preferred Stock A of the Railway Company are entitled to receive preferential dividends up to the amount of 5% for each fiscal year from 1915 to 1926 inclusive, to the extent that such dividends were earned in such years, but were unpaid (but not in excess of 5% for any fiscal year), before any dividends be paid by the Railway Company upon any other class of its stock"

and enjoining the Railway Company—

"from declaring or paying any further dividends upon its Preferred Stock B or any dividends upon its Common Stock until after all preferential dividends at the rate of 5% in each fiscal year upon its said Preferred Stock A, from the date of the organization of said Company down to and including the fiscal year 1926 to the extent that the Railway Company has had net earnings available for the payment of such dividends and to the extent that such dividends remain unpaid, shall have been paid to the holders of said Preferred Stock A."

That the individual defendants were the owners of Preferred Stock B and Common Stock of said Railway Company, as set forth in the bill filed and were joined as representatives of the two classes, to-wit, Preferred B stockholders and Common stockholders.

That the defendant, William Fraser Dickson, became such by intervention and that all of said defendants have [fol. 92] filed their answers denying the claims of plaintiff, and the cause coming on to be heard on an application for interlocutory injunction to restrain the payment of a 5% dividend on the Preferred Stock B declared by the directors of the Railway Company subsequent to the commencement of the suit, and payable on February 6th, 1928, to stockholders of record December 31st, 1927, by arrangement of the parties at the hearing the cause was submitted for final decree upon the bill of complaint and the answers of the respective defendants, including an answer by intervenor Dickson.

That your petitioner was not advised of the hearing until after the same has been had and the case submitted to this court. That it advised with counsel and was preparing to intervene in this cause, when it was announced that the final decision had been handed down.

That your petitioner is the owner of seven hundred (700) shares of the 5% Profit-Sharing Preferred Stock A of the Wabash Railway Company and desires to intervene in this cause and become a party plaintiff therein, to prosecute this cause in subordination to and in recognition of the propriety of the main proceeding, and to adopt the bill filed by the plaintiff herein as its bill, and to participate in

all proceedings in this cause as fully as the original plaintiff, John C. Barclay.

Your petitioner therefore prays for leave to file this petition of intervention and to be made a party to this cause as joint plaintiff herein, as fully and entirely as if named [fol. 93] as one of the original plaintiffs in the bill filed herein.

And it will ever pray, &c.

Joseph S. Clark, Solicitor for Willoughby Co., Intervenor, 1529 Walnut St., Philadelphia, Pa. Clark, Clark, McCarthy & Wagner, of Counsel.

Duly sworn to by Charles A. Pearson, Jr. Jurat omitted in printing.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER JOINING WILLOUGHBY COMPANY AS PARTY PLAINTIFF

This cause coming on to be heard on the application of the Willoughby Company, intervenor in this suit, to be made a party plaintiff, and the petition having been duly considered, and it appearing to the Court that the said petitioner is entitled to be made party as one of the class represented by the original plaintiff, it is

Ordered, adjudged and decreed, that the Willoughby Company, petitioner, has leave to intervene as a party plaintiff in said suit with the same force and effect as though it had been named as one of the original plaintiffs herein, and does hereby adopt as its complaint the bill of complaint of the plaintiff Barclay; such intervention to be in subordination to and in recognition of the propriety of the main proceeding and without prejudice to any proceedings heretofore had in this cause.

January 18, 1928.

Francis A. Winslow, Judge District Court of the United States for Southern District of New York.

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER FOR LEAVE TO APPEAL.

To the Honorable Judges of the United States Court for the Southern District of New York:

The above-named plaintiffs John C. Barclay and Willoughby Company, conceiving themselves aggrieved by the final decree entered on January 16, 1928, in the above-entitled cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors filed herewith, and they pray that this their appeal may be allowed and that citation issue as provided by law; and [fol. 96] that a transcript of the record and proceedings and papers upon which said decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

And your Petitioner further prays that an order fixing the security to be required of him to perfect his appeal be made.

(Sgd.) Wm. R. Begg, Solicitor for Plaintiff John C. Barclay, 24 Broad St., New York City, N. Y.
Joseph S. Clark, Solicitor for Plaintiff Willoughby Company, 1529 Walnut St., Philadelphia, Pa.

New York City, February 6, 1928.

And now, to wit, on February 8, 1928, it is ordered that the petition be granted and the appeal be allowed as prayed for upon giving bond as required by law in the sum of Two Hundred Fifty ($250) Dollars.

Wm. Bondy, District Judge.

[fol. 97] In United States District Court

[Title omitted]

Assignments of Error

Now come John C. Barclay and Willoughby Company, plaintiffs-appellants, and make and file this their assignment of error to the decree entered in the above cause on January 16, 1930.

1. The District Court of the United States for the Southern District of New York erred in denying the motion of plaintiff John C. Barclay for final decree in his favor upon his bill of complaint and the answers thereto.

2. The District Court of the United States for the Southern District of New York erred in ordering and decreeing the dismissal on the merits of the bill of complaint herein.

[fol. 98] 3. The District Court of the United States for the Southern District of New York erred in entering a final decree dismissing on the merits the bill of complaint herein.

4. The District Court of the United States for the Southern District of New York erred in its interpretation of the word "non-cumulative" as used in the contract which defines the dividend rights of the several classes of stockholders of the Wabash Railway Company.

5. The District Court of the United States for the Southern District of New York erred in holding as follows in its opinion:

"The dividend preferences not being cumulative but only preferential, in each fiscal year up to the amount of 5% before any dividend shall be paid upon any other stock of this corporation, etc., no unbelieved dividend is not to be piled up or accumulated so that payment of the accumulation is a condition precedent to the declaration of dividends on subordinate issues."

6. The District Court of the United States for the Southern District of New York erred in holding that the Board of Directors was vested with authority to pay dividends upon the Preferred B stock before all dividends accrued in prior

years upon Preferred Stock A of said Company are first paid and satisfied.

7. The District Court of the United States for the Southern District of New York erred in holding that the Board of Directors was vested with authority to pay dividends upon the common stock before all dividends earned in prior years upon Preferred Stock A of said Company are first paid and satisfied.

[fol. 99] 8. The District Court of the United States for the Southern District of New York erred in holding that the Preferred A stockholders, whose dividends are non-cumulative, are not entitled because of that fact to insist upon payment of their dividends earned in prior years but which still remain unpaid before dividends may be paid upon Preferred Stock B.

9. The District Court of the United States for the Southern District of New York erred in holding that the Preferred A stockholders, whose dividends are non-cumulative, are not entitled because of that fact to insist upon payment of their dividends earned in prior years but which still remain unpaid before dividends may be paid upon the common stock.

Wherefore plaintiffs-appellants pray that the decree of the District Court of the United States for the Southern District of New York, in this cause entered, be reversed and that a final decree be directed in their favor as prayed in the bill of complaint herein.

Dated New York, N. Y., February 6, 1929.

(Sgd.) Wm. R. Begg, Solicitor for Plaintiff John C. Barclay, 24 Broad Street, New York City, N. Y.
Joseph S. Clark, Solicitor for Plaintiff Willoughby Company, 1329 Walnut Street, Phila., Pa.

[fol. 100] Citation, in usual form, omitted in printing.

[fol. 101] In United States District Court

[Title omitted]

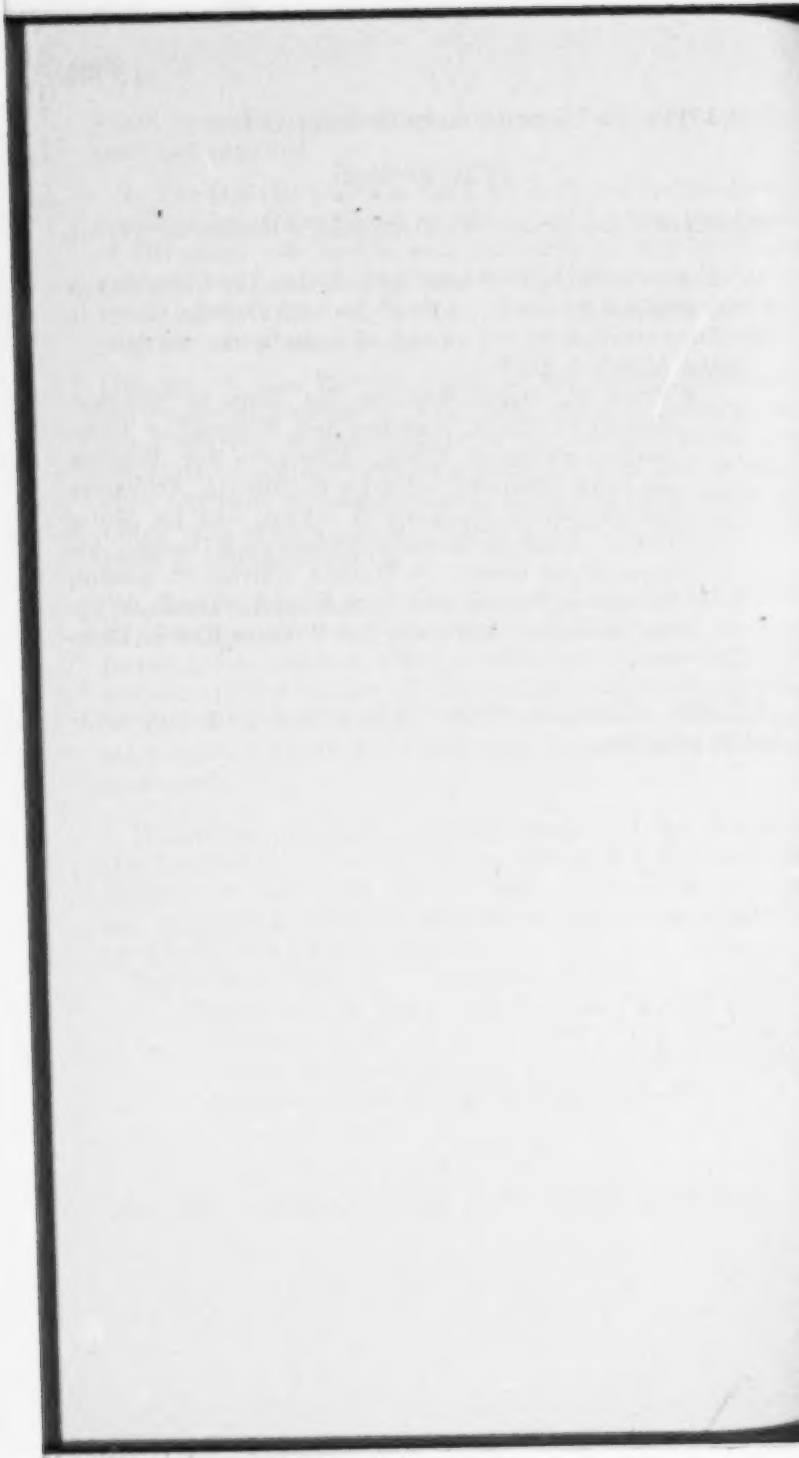
Stipulation Agreeing to Correctness of Record on Appeal.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated March 6, 1928.

William R. Begg, Solicitor for John C. Barclay. Joseph S. Clark, Solicitor for Willoughby Company. Pierce & Greer, Attorneys for Wabash Railway Company. Taylor & Roberts, Attorneys for Myron S. Hall, H. W. Cohn, and La Motte Cohn. Hughes, Rounds, Schurman & Dwight, Attorneys for Gerald V. Hollins, Shirley P. Austin, George R. Leslie, and Earl Krapp. Davis, Wagner & Heater, Attorneys for William Fraser Dickson.

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.



UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. BARCLAY and WILLOUGHBY COMPANY, Appellants,

against

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, La Motte Cohu, Gerald V. Hollins, Shirley P. Austin, George R. Leslie, Earle Krapp, and William Fraser Dickson, Respondents

Before Manton, L. Hand, and A. N. Hand, Circuit Judges

Appeal from the District Court for the Southern District of New York

Plaintiffs, John C. Barclay and Willoughby Company, sued for an injunction restraining the payment of dividends by the Wabash Railway Company to its junior stockholders. Decree for defendants; plaintiffs appeal. Decree reversed.

Wm. R. Begg, Esq., Joseph S. Clark, Esq., Ellis Ames Ballard, Esq., Solicitors for Appellants; Hornblower, Miller & Garrison, Esqs., Clark, Clark, McCarthy & Wagner, Esqs., Ballard, Spahr, Andrews & Ingersoll, Esqs., of Counsel.

Charles E. Hughes, Esq., Winslow S. Pierce, Esq., F. C. Nicodemus, Jr., Esq., Counsel for Defendant-Respondent Wabash Railway Company.

Charles E. Hughes, Esq., Counsel for Defendants-Respondents Gerald V. Hollins, Shirley P. Austin, Geo. R. Leslie, and Earl Krapp.

Davis, Wagner & Heater, Esqs., Solicitors for Respondent William Fraser Dickson; Arnold L. Davis, Esq., of Counsel.

MANTON, Circuit Judge:

Appellants are owners of Preferred Stock Class A. The appellees Messrs. Myron S. Hall, H. W. Cohu and La Motte T. Cohu are owners of Preferred Stock Class B and the ap-

pellees Gerald V. Hollins, Shirley P. Austin, George R. Leslie, Earl Krapp and William Fraser Dickson own common stock of the appellee Wabash Railway Company, an Indiana corporation organized October 22, 1915. On May 1, 1927, it had outstanding 690,000 shares, of $100 par value, Preferred Stock A and 24,000 shares, par value $100, Preferred Stock B, and 665,000 shares of common stock, par value $100. The certificate of incorporation provided:

"The Five Per cent Profit Sharing Preferred Stock A shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent before any dividends shall be paid upon any other stock of this corporation, but such dividends on the Five Per Cent Profit Sharing Preferred A stock shall be non-cumulative.

The certificates of Preferred Stock A made promise to the holders thereof of the same obligations. No dividend was paid from October, 1915 until January 29, 1917 on which day and quarterly thereafter, a dividend of one per cent on Stock A was paid up to and including April 30, 1918. From that date to May 25, 1925, no dividends were paid on this stock. On May 25, 1925 and quarterly thereafter 1¼% was paid. The complaint alleged that the earnings for each fiscal year available for dividends on Stock A on which the company declared no dividends or declared a dividend of less than 5%, were retained by the company and carried to its surplus account and used for additional working capital or betterments. Further, that during the period from its organization to May 25, 1925, the aggregate of preferential dividends of 5% in each fiscal year upon Stock A, to the extent that the railroad company had in each fiscal year during said period net earnings available for payment of such dividends, amounted to sixteen million dollars in excess of the dividends declared and paid by it on Stock A and it is alleged, all of this sum, available for such dividends, was carried to the surplus of the Railway Company and used for additional working capital and other corporate purposes. That on April 1, 1927, the Railway Company paid a dividend of 5% on its Preferred Stock B out of the earnings of 1926 or some preceding year and that it now threatens to pay regular dividends upon its Preferred Stock B and its common stock without first making good

and paying out of the surplus full preferential dividends of 5% in each fiscal year upon Stock A from the time of its organization to the extent that such preferential dividends were earned in each fiscal year but were not paid in full, thereby depriving the stockholders of Stock A of the dividend rights inhering in said Stock A and diverting from Stock A net earnings available for such preferential dividends thereon which were not paid. The answer alleges that the entire surplus of all periods since the incorporation of the Railway Company not distributed to stockholders and not reserved for working capital or necessary corporate requirements, has been actually appropriated to and is now represented by fixed and permanent improvements and additions to the property.

That this was necessary to enable it to carry on its corporate purposes and that no part of the surplus represented by cash or earnings has been available for dividends. It admits, however, that all sums of over sixteen million dollars were carried to the credit of the surplus account of the Railway Company and still forms a part of the present credit to that account. It is admitted that the certificate of incorporation is as alleged by the plaintiffs and that dividends were paid on Preferred Stock A to the extent alleged. The relief sought by the appellant Barclay is for an interlocutory injunction to restrain the threatened payment of the dividend on Stock B declared after the bill was filed payable February 6, 1928 out of earnings of 1927 and, also, by the appellants to enjoin the payment of dividends on common stock until it shall first have paid the preferential dividends which have been earned in prior years and which have not been paid on Stock A. By stipulation it is agreed that the interlocutory judgment should be deemed and treated as having resulted from a motion for a final decree on the bill and answers filed and the court so treated it, dismissing the bill on the merits. From that decree this appeal is prosecuted.

Recognizing that no dividend, other than in liquidation, may be paid except out of earnings, and that Preferred B and common stockholders may receive dividends only after the preferential dividends given Class A stockholders are paid, the parties differ as to the construction to be placed upon the terms of the preferential contract of Stock A.

What is the intent and extent of this dividend preference we must consider. It is not disputed but that Class A receives preferential dividends in each fiscal year up to the amount of 5%. It must be paid "before any dividend shall be paid upon any other stock of this corporation." At once the issue is presented as to what is meant by "shall be non-cumulative." Appellants' argument is that it means that the dividends each year are dependent upon the earnings of the year; that they, as Preferred A stockholders, are not entitled to receive dividends for any year unless they are earned in the year. Admitting that in past years an aggregate of over sixteen million dollars was earned upon its preferred stock, taking the annual earnings year by year, which might have been paid as Preferred A dividends, the board of directors in the exercise of its discretion, used earnings to pay the cost of additions and improvements to the property and to increase its working capital, and the argument now is, that because of this, Preferred A stockholders have lost all their right to the dividends for the years unpaid. That future earnings may not be appropriated by the board to pay dividends for the years when, although there were profits, no dividend on this class of stock has been declared, is now asserted by the appellees.

Cumulative dividends must be paid regardless of the year in which they are earned, while non-cumulative dividends paid any year are dependent upon the earnings of that year. If not earned in the particular year, the stockholders are not entitled to dividends for that year and the deficiency cannot be made up out of surplus earnings of a subsequent year. But the appellants' argument is that if dividends were earned during any particular year, although not declared by the Board of Directors and even though earnings were used for improvements and betterments if, in a subsequent year, there is a profit, common stockholders under the terms of this certificate, may not share in that profit unless and until dividends have been paid on Preferred Stock A up to the amount of the earnings of the particular year but not to exceed 5% as provided.

Preferred A stock received a dividend credit to the extent of the earnings each year not to exceed 5%. It secured no dividend credit whatever in any year where there were no earnings. A board of directors may deem it unwise

to declare non-cumulative dividends at the end of each year or at any particular time until conditions are favorable for dividend distribution. But in the meantime, the dividend credit in favor of the preferred stockholders increases to the extent of the earnings of each year and against the dividend credit charges are made to the extent that the preferred dividends are declared and paid. The surplus account to the extent of this dividend credit in favor of the Preferred Class A is marked, in a sense, in favor of such stockholders. It cannot be used for the payment of dividends on any stock junior to Preferred A until that credit has been satisfied.

The reported cases, considering this question, are (1) cases in which the right of the board to pay earned but withheld non-cumulative preferred dividends for prior years without reference to the fund from which payment was made; (2) cases in which the right of the board to refuse payment of earned but withheld noncumulative preferred dividends upon demand by the preferred stockholders was presented, and (3) cases in which the right to enjoin payment of dividends on junior stocks until after payment of earned but withheld noncumulative preferred dividends for prior years was presented. The right of the board to declare noncumulative preferred dividends for prior years is not necessarily presented here. But on April 1, 1927, the board did declare a dividend for the year 1926 on Preferred B stock. The certificate of Class A stock makes such stock entitled to receive preferential dividends "before any dividends shall be paid upon any other stock." This language would indicate that the board of directors could not declare dividends on B stock until A stock was fully satisfied as to dividends. Wood v. Lary, 47 Hun. 550, presented the question of whether a board had the right to pay noncumulative dividends at the end of a four-year period during which the dividends were earned year by year and to pay such dividends by issuing bonds of the company. The contract provided as to preferred stockholders that they were "entitled to dividends, not to exceed six per cent, payable semiannually, not cumulative, whenever in any year the net earnings, after payment of all interest charges, shall suffice for payment thereof." No preferential dividends were paid for the years in question,

but during the period dividends were earned and the money was expended for construction account. After the four years, the board met and declared a dividend upon the noncumulative preferred stock payable in bonds. The common stockholders objected, alleging that the preferred dividends were noncumulative and the directors had no right to declare preferred dividends for these prior years. The court held, however, referring to the phraseology of the certificate, that whether or not the directors declared a dividend of these profits earned in each year, the stockholders were entitled to them and their rights therein became fixed and even if the directors made no division thereof, the rights still existed and could not be taken away; that the subsequent compliance by the directors with the terms of the contract in the declaration of a dividend did not infringe upon the provision of the certificate which made the dividends noncumulative. From a very well reasoned opinion, it would appear that if the board at the end of the four year period had undertaken to pay common dividends without first paying and satisfying those earned but unpaid and noncumulative preferred dividends, the preferred stockholders would have had the right to enjoin the payment of such common dividends. It is also noteworthy that at the time of the passage of the dividend resolution and the execution of the mortgage and issue of the bonds, the amount of the net earnings was not in hand in cash, but was in the hands of the corporation as new property in addition to and in excess of the property received by it at the time of the reorganization. In Bassett v. U. S. Cast Iron Pipe & Foundry Co., 74 N. J. Equity, 668, 70 Atl. 929; on appeal, 75 N. J. Equity, 539, 73 Atl. 514, and Moran v. U. S. Cast Iron Pipe & Foundry Co., 95 N. J. Equity, 389, affirmed in 96 N. J. Equity, 698, the board declared dividends on its noncumulative preferred stock for prior years in which such dividends had been earned and a common stockholder sued to enjoin payment and the right of the board to declare and pay these preferred dividends was sustained even against the objection that they were designated "non-cumulative." In Collins v. Portland Electric Power Co., 12 Fed. (2d) 671, where the board declared dividends upon its non-cumulative preferred stock for prior years, which had been earned in those years, the common stock-

holders' suit was to enjoin the payment because the preferred stock was noncumulative and it was declared that the board had such power. In N. Y., Lake Erie & W. R. R. Co. v. Nickals, 119 U. S. 296, the Supreme Court considered dividend rights of preferred stockholders whose dividends were noncumulative and referred to noncumulative dividends as such because they were dependent upon the profits of each particular year and were not to be fastened upon the profits of the succeeding year. In Staples v. Eastern Photographic Materials Co. (1896) L. R. 2 Ch. Div. 303, a stockholder's contract read:

"The holders of the preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10 1 per cent per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holder of ordinary shares shall be entitled to a like dividend at the rate of 10 1 per cent per annum on the amount paid on each ordinary share. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend."

Lindley, L. J. said:

"Are they (the preferred holders) to have cumulative dividends, or are they to have dividends only according to the share of the profits in each year in which there are profits?"

And again:

"It appears to me that the reference of the dividend to the profits of each year is most marked."

Kay, L. J., in his opinion said:

"I do not find any provision that the holders of preferred shares are to be entitled in any event to a dividend per annum at the rate of 10 per cent. I can only find an indication that out of the profits of each that shall be their share of those profits."

It is apparent that Kay, L. J., felt that if there were profits in each year up to the 10% and the dividends up to that amount among the preferred were not declared in those

years, it would have to be made up before any other dividends would be paid.

In the second class are found preferred stockholders who, in order to sustain a demand for payment of their dividends, are held to a showing that they are entitled to receive the dividends demanded. If the dividends of a prior year are cumulative, delay in the declaration and payment is of no importance; if non-cumulative, the company has a good defense against any demand if not earned. In the absence of an abuse of discretion, the board of directors cannot be forced to pay dividends. In N. Y., L. E. & W. R. R. v. Nickals, supra, preferred stockholders demanded the payment of their noncumulative stock dividends which had been earned in a prior year under a contract and this demand was denied. The contract provided for

"Preferred Stock • • • entitling the holders to noncumulative dividends, at the rate of six per cent per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors."

The Supreme Court held that under this contract the dividends were payable as declared by the Board of Directors. It pointed out that the evidence showed that the profits for the year were applied to the objects which were legitimate and proper and as the condition of the company was not such as to make the declaration of the dividend a duty on the part of the directors, there was no basis for the claim to such dividend. Dent v. London Tramways Co., 16 Chan. Div. 344 (1880) referred to in the Nickals case, was a suit by preferred stockholders to secure a declaration that they were entitled to their dividends earned in prior years on a certificate which granted a "preferential dividend of 6 per cent per annum over the present shares of the company dependent upon the profits of the particular year only." The company claimed the right to further postpone the payment of the preferred dividends although they had been earned, and it was held that they must be paid even though they were noncumulative dividends earned in prior years. The company had used the earnings to pay dividends on ordinary shares in place of using them

for betterments and improvements. In Burk v. Ottowa Gas & Electric Co., 87 Kan. 6, 123 Pac. 857, the action was by preferred stockholders against a public utilities corporation and its directors to require an accounting and a decree ordering the directors to declare such dividends from the net profits of the business as should have been declared since January 1, 1906. The certificate of stock provided:

"The preferred stock shall carry a six per cent per annum preferred noncumulative dividend, payable semi-annually on the first day of July and January of each year after January 1, 1906, out of the net profits of the preceding fiscal year, and the pro tanto dividend if such dividend shall fall short of 6 per cent."

In each year from 1906 to 1910 the company made profits which were put into extentions of plant and properties. The trial court found the extensions were "necessary" but did not specifically find that they were necessary for a public utility company to perform its obligations to the public. Reversed on appeal, the trial court was ordered to take further proof. Speaking of the contract, the court said:

"The fair interpretation of the contract between the corporation and the holder of this stock is that, if in any year net profits are earned, a dividend is to be declared. To hold that the board of directors—that is to say, the corporation—has a discretion to declare or not to declare a dividend when it has funds that it can use for the purpose, is to hold that one of the parties to a contract has the option to pay something to the other or not, at its own election, since if the dividend is not declared at the end of the year, the benefits of the accumulated profits are practically lost to these stockholders. Such a construction should be avoided if any other is reasonably open, because it would result in temptation to unfair dealing."

Appellees argue, however, that this case is to be distinguished because of the phrase of the certificate "out of the net profits of the preceding fiscal year" constituted a guaranteed dividend and says that the words are absent in the instant case. The earnings were put into the plant for extensions but the court nevertheless granted relief. In Star

Publishing Co. v. Ball, 192 Ind. 1'3, 134 N. E. 385, which was a suit by a preferred stockholder to enjoin a bond issue and for a decree requiring payment of dividends on stock, the certificate provided:

"Equal noncumulative dividends shall be paid on all outstanding shares of such preferred stock * * * at the rate of five (5) per centum per annum, payable quarterly * * * in each year, when earned and declared out of the funds of the company available therefor, and no dividends shall be paid upon any of the shares of said common stock * * *, until full payment has been made of all dividends declared upon the outstanding shares of preferred stock authorized by such articles of association."

Between 1911 and 1918, the affairs of the company were in such condition that it could have paid 5% preferred dividends in each of the years but no dividends were paid until the company was compelled to by the action of the trial court. In affirming the judgment below, the court said:

"The serious question in our minds is whether the court should not have declared a greater dividend, and whether appellee should not succeed on his cross-error. But at this point we are met with a record which gives us no finding as to the necessary working capital for the year 1918, nor, in fact, for any year."

Further

"Appellant claims that appellee waived his right to dividends by acquiescing in the use of the net earnings and profits of the company in paying the mortgage debt. In this appellant is in error. It merely suspended the appellee's right until there was an excess of earnings over the amount reasonably required to be expended for that purpose."

Thus the claims of the preferred stockholders were sustained where the dividends were noncumulative. The application of the proportion of the earnings, which might have been used for payment of preferred dividends, to pay the debts of the company, operated merely as a suspension or postponement of the right of the preferred stockholders to receive their postponed dividends.

With this understanding of "noncumulative," the sixth holders of Preferred A have not lost their preference dividend rights for prior years and are entitled to have those recognized and the dividend paid before any dividend may be paid on the junior stocks. In Bates v. U. S. Cast Iron Pipe & Foundry Co., 62 N. J. Equity, 466, Dumont v. U. S. Cast Iron Pipe & Foundry Co., 74 N. J. Equity, 668, on appeal in 75 N. J. Equity, 628, and Day v. U. S. Cast Iron Pipe & Foundry Co., 62 N. J. Equity, 666, affd. 63 N. J. Equity, 798, the New Jersey courts dealt with the question of non-cumulative dividends. By a certificate which provided that "The preferred stock shall be entitled, out of any and all surplus net profits, whenever declared by the board of directors, to noncumulative dividends at a rate not to exceed 7 per cent per annum for the fiscal year beginning the 1st day of June, 1899, and for each and every other fiscal year thereafter, payable in preference and priority to any payment of any dividend on the common stock for each fiscal year," it was held that the profits to the extent that they were earned in the prior years belong primarily to the preferred stockholders and in distributing them as dividends, no restriction was imposed upon the board other than as to time or occasion. And even having decided to divide the profits, duty compels discretion and a honest investment upon the directors to discharge the company's obligation to pay the fixed yearly preferred dividends and the before any dividends shall be paid upon the common stock. As to noncumulative dividends, they are to be paid out of the profits of any fiscal year, not more than the percentage fixed by the charter to be paid on such stock for such year. But that does not prohibit the company, after having paid the fixed yearly dividend from, in the same year, declaring and paying additional dividends out of the profits earned in prior years available to dividends for such years and which, but for holding them in reserve for accounts receivable, would have been distributed as dividends in those years. That such profits belong primarily to the preferred stockholders and the directors are in no wise restricted either as to amount, time or occasion when the distribution shall be made. In Collins v. Portland Electric Power Co., supra, the board of directors declared three dividends in 1913 on noncumulative second preferred stock, the first for

the year ending December 31, 1921, the second for the year ending December 31, 1923, and the third for the year ending December 31, 1925, and also a dividend upon common stock for the year ending December 31, 1924. The second preferred stockholders sued to enjoin the payment of common dividends because of non-payment of the second preferred dividends for prior years. The defense contended that the second preferred dividend stockholders for prior years had lost their rights to dividends because, being noncumulative, they were not declared within the year and also because, under the contract, the board was authorized to pay common dividends even though second preferred dividends for prior years still remained unpaid. The common stockholders filed a bill in the second case to enjoin payment of preferred stockholders on the ground that their dividends for prior years were lost because not declared within the several years respectively. The contract provided that

"the dividend upon the prior preference stock of every series and the first preferred stock shall be cumulative, but accumulations of dividends shall not bear interest. The holders of the second preferred stock are entitled to receive, when and as declared, out of the surplus or net profits of the company, dividends at the rate of 6 per cent. per annum payable as the board of directors may determine, before any dividend shall be set apart for or paid upon the common stock. The dividends upon the second preferred stock shall not be cumulative."

It was said on appeal to the Ninth Circuit Court of Appeals that the

"controversy between the parties on this appeal is narrowed to the issue whether dividends upon the second preferred stock are lost if not declared and paid within the year, notwithstanding that there may have been earnings sufficient to pay all or part thereof, or whether the fact that the earnings were made gave to the holders of the second preferred stock a positive right to dividends out of said earnings, with the result that the directors may lawfully declare and pay such dividends in subsequent years."

And it was held that the directors, having declared dividends for the years 1921 and 1922, recognized that the dividends ought to have been paid in those years and that the condition of the company's property and affairs as a whole justified their action in declaring such dividends. In Continental Ins. Co. v. United States, 259 U. S. 156, referred to by appellees, the court considered a suit by common stockholders who, in the distribution of assets on the dissolution of the company, demanded an award in their favor of an amount equal to dividends which the board might have declared upon the common stock in prior years and payment of such award upon any capital distribution to the preferred stockholders. The board of directors had capitalized these dividends. The court held that the common stockholders could not force the board to declare and pay common dividends for prior years even though the dividends had been earned, if the board, in the exercise of its proper discretion, failed to declare and pay such dividends. The right of the board to pay common dividends, which had been earned in prior years, at any time before dissolution was recognized, but the court held that undivided earnings are to be capitalized and distributed on liquidation unless the board of directors has applied them as dividends. No other question of dividend priority was presented for consideration. We are also referred to Norwich Water Co. v. Southern Ry. Co., 11 Va. Law Register (New Series) 202 where the Chancellor held, subject to certain limitations, that a noncumulative preferred stock dividend for any particular year is lost to the preferred stockholders if not declared within the year. He pointed out that a failure to declare dividends within the year results in loss to the preferred stockholders of their right to demand that dividend but not a loss to the directors of their right to pay it. Of course, stockholders never had the right to demand payment within the year and the stockholders in the Norwich case never had such right to demand. The contract provided for the "non-cumulative dividends * * * from the net profits * * * and only when and as such Board shall declare dividends therefrom." The board could postpone the declaration until after the termination of the year. The Chancellor held that the characterization "non-cumulative" did not apply

if, under the contract, the preferred stockholders have the absolute right to their dividends, and that an obligation is imposed upon the company to pay it. He declined to hold that there was an absolute right or obligation under the particular contract. That determination is undoubtedly influenced by the terms of the contract, which the Chancellor considered, which provided for priority in any payment of dividends from the net profits of the company

"as such shall be fixed and determined by the Board of Directors and only when and as such Board shall declare dividends therefrom; but, notwithstanding the preference hereby declared, if, after providing for the payment of dividends for any fiscal year on the Preferred Stock outstanding in such year, there shall remain a surplus of net profits of such year, the Board of Directors may declare and pay dividends upon any other stock of the Company for such year out of such surplus net profits."

Even though it be thought that the decisions on which appellants rely have been controlled by the particular wording of corporate charters and State statutes, yet it can hardly be maintained that any decision of a court of last resort is definitely against appellant's claim. Continental Trust Co. v. United States, supra, seems to be regarded by appellees as supporting their position. But that is not so for the reasons already stated.

It is said that the right to declare and pay dividends to the non-cumulative preferred stock rested with the directors and no longer exists because the earnings of former years which might have been paid to the preferred stockholders have become capital. But where there is arbitrary conduct by directors in withholding payment of dividends, relief may be had against it in a court of equity. If all stockholders may have relief where dividends are arbitrarily withheld, we cannot see why non-cumulative preferred stockholders do not possess similar equities where earnings which might have been applied to dividends on non-cumulative preferred stock have been placed in the capital account and retained there and subsequent earnings not needed for capital are to be distributed to one class of stockholders or other.

Preferred stockholders are not in all respects joint adventurers with common stockholders. Even if having a vote, the control of the corporation is nearly always in the hands of the common stockholders and the directors are thus really chosen by the latter.

It is manifest that if directors, in effect selected by the common stockholders, be given almost unlimited power to retain in the capital account earnings which might have been voted to non-cumulative preferred stockholders and likewise the power to vote dividends to the common stock from earnings in subsequent years without recognition of any deferred prior right of the preferred stockholders, the common stock really secures priority over the preferred stock to the extent of the earnings which have been appropriated for capital. The power to bring about such a result subjects directors to an undesirable temptation to favor the common stockholders, who ordinarily control the corporation, and is not required by the terms of the corporate charter or by judicial authority. Recognition of a deferred credit seems to a majority of the court to be based on considerations of good public policy as well as sound equitable principles. (See article in Vol. 23 Columbia Law Review, p. 357, on "Non-cumulative Preferred Stock" by A. A. Berle, Jr. and note in Vol. 34 of the Yale Law Journal, at p. 657, on "The Rights of Non-cumulative Preferred Stockholders in Undivided Profits.")

The failure of the board of directors to declare Preferred A dividends and the appropriation of the earnings with which they might have been paid to increase the working capital and to pay for construction of extensions and additions, we hold resulted only in granting a dividend credit which, at some postponed date, may be paid to Preferred A stockholders as dividends under the terms of the contract. They are still entitled to receive such dividends and the Board may not pay dividends upon junior stocks until after these earned dividends of Preferred A stock are first paid and satisfied.

Decree reversed.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. John C. Barclay & ano. vs. Wabash Railway Co. et al. (Copy.) Opinion. Manton, Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. BARCLAY and WILLOUGHBY COMPANY, Appellants,

against

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, LaMotte Cohu, Gerald V. Hollins, Shirley P. Austin, George R. Leslie, Earle Krapp, and William Fraser Dickson, Respondents

L. HAND, Circuit Judge (dissenting):

The relevant clause of the charter gives the plaintiffs "preferred dividends in each fiscal year up to the amount of five per cent," and the case concerns only the earnings of a current year, not the distribution of accumulations carried over from earlier years. There were undeclared earnings in such years, but they are now in the form of track, equipment and working capital, and in that form they will remain, for the directors do not mean to distribute any of the working capital, obviously the only part which they could. The words, "up to the amount of five per cent," were prima facie used in limitation as well as in grant, and the question is whether the circumstances require us to import an exception. The occasion is that the earlier earnings could have been declared, had not the directors decided that the corporation needed the money for its general operations, a decision which nobody challenges.

If the directors proposed to reduce the working capital accumulated out of past earnings, they would probably be obliged to declare as preferred dividends the amount so withdrawn. That was the situation in Bassett v. U. S. Cast Iron etc. Co., 75 N. J. Eq. 539, and also in Collins v. Portland etc. Co., 12 Fed. (2) 671, (C. C. A. 9), as I understand the facts, although the report is not altogether clear. But in the case at bar the directors still need the working capital which they accumulated out of earlier earnings; the only way in which it can be considered to be distributed is by gratuitously marshalling the proposed common dividend against earlier earnings and using current earnings to make up the deficit so created. That I

submit would be legerdemain. Moreover, since there is no rational distinction between working capital and track and equipment, the result of our decision must be to establish a deferred credit of $16,000,000, which must be declared out of the earnings of later years before the common shares can get anything whatever. There is not the slightest reason to suppose that the preferred shares would have claimed anything of the sort, or that the common shares would have yielded it if they had. Apparently in Day v. U. S. Cast Iron etc. Co., 95 N. J. Eq. 389, the working capital was indeed not reduced and the preferred shares were awarded some part of the earlier earnings, though even this is not entirely clear. But the case was decided by an evenly divided court in which six out of the nine justices voted to deny the claim and where everyone supposed that the New Jersey statute was important, if not determinative. The case is scarcely authority for the position here taken.

Nor are those cases authority where the charter makes the preferred dividends depend only upon earnings, (Wood v. Lary, 47 Hun 550; Burk v. Ottawa etc. Co., 87 Kas. 6). The directors have then no choice and must declare the dividends in the year in which the earnings are made, or as soon as the shareholders demand them. Such cases are outside the general rule laid down in N. Y. L. E. & W. R. R. v. Nickalls, 119 U. S. 296. Again, the majority shareholders may have abused their powers as in Star Pub. Co. v. Ball, 192 Ind. 158, where, moreover, the discussion of the preferred shareholders' rights to a larger dividend than that allowed by the lower court gives as much comfort to the appellees here as to the appellants. In the case at bar both sides agree that the directors must declare the earnings as dividends before the shareholders can become entitled to them, and that their judgment was honestly exercised when they declined to declare them in the past.

What is there then which should induce us to ignore the limitation of the charter, that out of the earnings of any year the preferred dividends shall be limited to five per cent? Nothing but the fact that in past years it was inadvisable in the company's interest to retain what except

for those interests should have been declared. To such contingencies preferred shareholders are as subject as common; they accept them in the character of their investment. We must say that in some way the mere existence of earnings gives them a right, not immediate indeed, for that would be too flagrant a disregard of the language, but as a kind of lien on subsequent earnings when these can be spared. That might be a good sort of investment, but how have they stipulated for it? They have agreed not to claim earnings as such and to limit their rights upon the earnings of any given year. I can see no basis for the interpolation of this added right; it seems to me to violate the basic agreement. None of the considerations which apply to deferred dividends touch it at all; it is a mere gratuity.

The only decision in point, except Day v. U. S. Cast Iron etc. Co., is Norwich Water Co. v. So. Ry. Co., 11 Va. Law Reg. (N. S.) 203, in which, however, though the discussion bears out the view I take, the charter was such as of itself to compel the result. On the other hand, Continental Trust Co. v. U. S., 259 U. S. 156, is not so foreign to the case as my brothers think. If prior earnings retain no earmarks upon dissolution, though they are then a part of the very funds distributed, it would seem that they should not create a lien upon subsequent earnings which are no part of them and which indeed result only in small measure from their use as capital.

Nor do I understand how any equities can be said to exist except from an implied intent, for which there is no warrant. The notion that preferred shareholders are weaker in bargaining power may or may not be true; I know too little of the facts. Prima facie they must be taken at their word like other people, and if any tenderness is due them it should follow upon an inquiry which courts have no power to make. I agree that directors, who generally hold common shares, may be induced to starve the preferred shares in the hope of greater earnings from an increased capital, eventually taking form in greater common dividends, and though that is a somewhat remote motive, it may be real enough. But preferred shareholders, as well as common, accept the situation; the law has long advised them that their rights depend upon the judgment

of men subject to just that possible basis; the language chosen implies that their action shall be a condition upon any dividends. Why we should distort that language against the possibility of a dereliction of duty, for which, though hard to prove, the law gives redress, I do not see. Courts must not be blind, but the correction of possible injustices may come at too high a price. Words are illusive enough at best, but when all is said, they are the only means of communication we have. On the loyalty of their interpretation more in the end depends than on our power to right such wrongs as result from their inconsiderate use.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. John C. Barclay and Willoughby Co., Appellants, vs. Wabash Ry. Co. et al., Respondents. Dissenting opinion. L. Hand, C. J.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 14th day of January, one thousand nine hundred and twenty-nine.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Augustus N. Hand, Circuit Judges.

JOHN C. BARCLAY and WILLOUGHBY COMPANY, Plaintiffs-Appellants,

v.

WABASH RAILWAY COMPANY et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. John C. Barclay and another v. Wabash Railway Company et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1929. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, SOUTHERN DISTRICT OF NEW YORK

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of John C. Barclay and Willoughby Company, Plaintiffs-Appellants, against Wabash Railway Company et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of January, in the year of our Lord one thousand nine hundred and twenty-nine, and of the Independence of the said United States the one hundred and fifty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 130] SUPREME COURT OF THE UNITED STATES

No. 693

ORDER ALLOWING CERTIORARI—Filed March 11, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Order granting petition for certiorari.

[fol. 131] SUPREME COURT OF THE UNITED STATES

No. 694

ORDER ALLOWING CERTIORARI—Filed March 11, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Order granting petition for certiorari.

Endorsed on cover: File No-. 34,002, 34,003. U. S. Circuit Court of Appeals, Second Circuit. Term No. 693. Wabash Railway Company, Myron S. Hall, H. W. Cohu, et al., petitioners, vs. John C. Barclay and Willoughby Company. No. 694. Shirley P. Austin, petitioner, vs. John C. Barclay and Willoughby Company. Petitions for writs of certiorari and exhibit thereto. Filed February 12, 1929. File No-. 34,002, 34,003.